

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 91

JOHN WILEY & SONS, INC., PETITIONER,

vs.

DAVID LIVINGSTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

27629

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale and Department Store Union,
AFL-CIO, Plaintiff-Appellant,

against

JOHN WILEY & SONS, Inc., Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix to Brief for Plaintiff-Appellant—
Filed August 27, 1962

Weisman, Allan, Spett & Sheinberg, Attorneys for
Plaintiff-Appellant, 1501 Broadway, New York
36, N. Y.

Irving Rozen, of Counsel.

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO, Plaintiff,

v.

JOHN WILEY & SONS, INC., Defendant.

DOCKET ENTRIES

1962

- Jan. 23—Summons and Complaint served and filed.
Jan. 25—Order to Show Cause why arbitration should not
be compelled, returnable Jan. 30—served.
Mar. 6—Hearing had before Judge Sugarman on motion
to compel arbitration.
Mar. 30—Order—petitioner's motion to compel arbitra-
tion denied.
Apr. 18—Notice of Appeal from Order served by mail.
Apr. 19—Notice of Appeal filed with Clerk of the South-
ern District of New York with bond.
June 28—Docketed and filed record on appeal.

[fol. 2]

**IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

[Title omitted]

SUMMONS—January 23, 1962

To the above named Defendant:

You are hereby summoned and required to serve upon Weisman, Allan, Spett & Sheinberg, plaintiff's attorneys, whose address is 1501 Broadway, New York 38, New York, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Herbert A. Charlson, Clerk of the Court.
Elsie M. Eiler, Deputy Clerk.

[fol. 3]

**IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

COMPLAINT—Filed January 23, 1962

Plaintiff, by its attorneys, Weisman, Allan, Spett & Sheinberg, complaining of the defendant, alleges:

1. This Court has jurisdiction of this cause of action under Section 301 of the Labor-Management Relations Act, Title 9, United States Code Annotated 29 U. S. C. Sec. 185 and the United States Arbitration Act, Title 9, U. S. C.
2. Plaintiff, hereinafter called the "Union" is an unincorporated association, a labor organization located at 13 Astor Place, in the Borough of Manhattan, City, County and State of New York, with a membership of upwards of 30,000 individuals in the metropolitan area of the City of New York, and in collective bargaining relationship with upwards of 2,000 employers in the said metropolitan area.

4.

3. Defendant, hereinafter called the "Company" is a New York corporation, with its principal place of business in the Borough of Manhattan, City, County and State of New York, and is engaged in the publishing, selling and distribution of books and other publications in interstate commerce. Defendant does a business in interstate commerce annually in a sum upwards of nine millions of dollars.

4. Interscience Publishers, Inc., hereinafter called "Interscience" was a New York corporation with offices in the Borough of Manhattan, City, County and State of New York, [fol. 4] and was likewise engaged in the publishing, sale and distribution of books and other publications in interstate commerce in excess of a million dollars annually.

5. The Union has been for many years in collective bargaining relationship with Interscience, and the current contract presently in force, is dated February 3, 1958. A copy of this contract is attached hereto, marked Exhibit "A". Supplementary letters modifying said contract dated respectively April 8, 1960 and March 6, 1961, between the Union and Interscience, are attached hereto and marked Exhibits "B" and "C".

6. On or about October 2, 1961, Interscience consolidated with the Company, defendant in this action, under the Stock Corporation Law of the State of New York.

7. Section 90 of the Stock Corporation Law of the State of New York provides:

"Rights of Creditors of Consolidated Corporations,

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholders thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The

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stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any [fol. 5] constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated in the same manner as if such consoli- [sic] in place of any constituent corporation, by order of the court in which such action or proceeding may be pending"

Notwithstanding the foregoing, the Company, since said consolidation on or about October 2, 1961, has failed and refused to recognize the validity of said collective bargaining agreement (Exhibits "A", "B", and "C", hereinabove referred to), currently and beyond January 30, 1962, and has failed and refused to recognize the property rights of the former Interscience employees thereunder, and otherwise beyond January 30, 1962, in that among other things:

(A) It has failed to recognize and continue the seniority rights of said employees vested in them during their employment by Interscience;

(B) It has failed and refused to make proper reports and payments to the District 65 Security Plan and the District 65 Security Plan Pension Fund as provided in Article XV of said collective bargaining agreement;

(C) It has failed to recognize the job security rights of said employees including the grievance machinery and arbitration procedures set forth in said collective bargaining agreement;

(D) It has failed to obligate itself to continue liable for severance pay as provided in Article XXIII of said collective bargaining agreement;

[fol. 6] (E) It has failed to obligate itself to continue the vested vacation rights to Interscience employees as

specified in the current collective bargaining agreement.

8. Interscience employed some forty employees and the Company presently employs said employees. Attached hereto as Exhibit "D" is a schedule showing their names, the dates when their employment commenced, duration of service, and salaries and ages.

As said Exhibit "D" reveals, the employees have built up many years of seniority, running as high as eleven and a third years, and unless these seniority rights are protected in accordance with said collective bargaining agreement or otherwise, said employees will be seriously affected and prejudiced. The salaries of the said employees are fairly substantial, running as high as \$124.45 per week, and it would be extremely difficult, if not impossible, for many of these employees to obtain similar jobs at similar salaries if they were to be discharged by the Company at some future date. Further, even if such discharged employees were to receive similar salaries elsewhere, they would be compelled to start without any seniority, to their serious damage and prejudice.

9. Under said collective bargaining agreement, Interscience is obligated to keep on deposit with the said Plan and Fund, against future contributions by it, the sum of \$4,000, but in violation of said obligation, on or about October 1, 1961, it furnished the said Plan and Fund with a report for the third quarter of 1961, showing the sum of \$4,184.06 due from it to the said Plan and Fund, and instead of making payment of said last named amount, it remitted the sum of only \$684.06, thus improperly crediting to its account its then deposit of \$3,500.

Interscience's contributions to the said Plan and Fund in the past have averaged about \$4,000 a quarter, and there [fol. 7] will be due and payable, on or about January 30, 1962 for the last quarter of 1961, an additional contribution by it in the sum of approximately \$4,000, but the Company has stated that it will not make such payment.

Said "65 Security Plan" and "65 Security Plan Pension Fund" are organized and maintained out of contributions

made by employees in collective bargaining relationship with the Union for the health, welfare and pension benefits to members of District 65, as employees of their respective employers.

The Company should increase the deposit by \$500; so that there is now or shortly due the sum of \$3,500, (wrongly credited by the Company on October 1, 1961), the sum of \$4,000 (due January 30, 1962) and the sum of \$500 (additional deposit above mentioned)—a total of \$8,000. The Company refuses to obligate itself to make any such payments in the future.

10. The Company has failed and refused to recognize said collective bargaining agreement and the supplementary letters modifying said contract (Exhibits "A", "B", and "C", hereinabove referred to) in that it has refused to comply with the grievance machinery and arbitration procedures set forth in said collective bargaining agreement. The job security, the grievance machinery, and the arbitration provisions of said collective bargaining agreement are among the most important provisions of said contract, affecting as they do job security and conditions of employment of the Company's employees, and the failure of the Company to recognize and comply with said provisions directly affect the tenure, seniority and job security of said employees.

11. Article XVI of the said collective bargaining agreement provides in part, as follows:

[fol. 8] "Sec. 16.0. Any differences, grievances or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as 'grievance': • • • "

12. Article XXIII of the said collective bargaining agreement provides in part:

"Sec. 23.0. Employees (1) discharged for cause, as limited below, and not thereafter rehired or reinstated,

or (2) who are laid off by the employer for an indefinite period of time, or for a specific period of more than thirty (30) days, and who have rendered at least six (6) months continuous service with the employer, shall receive severance pay, as follows:

Over six (6) months and under one year of continuous service	1 week
Over one (1) year and under two years of continuous service	2 weeks
Over two (2) years and under four years of continuous service	3 weeks
Over four (4) years and under seven years of continuous service	4 weeks
Over seven (7) years and under ten years of continuous service	5 weeks
Over ten (10) years of continuous service	6 weeks

Severance pay shall be computed on the basis of the employee's regular weekly rate of pay in effect at the time of such layoff.

[fol. 9] The Company is, however, in violation of the aforesaid rights of the employees in that it has refused to obligate itself in any manner with respect to severance pay obligations under said contract and has refused to reassure the said employees that their severance pay will be paid to them at any time in the future should the occasion therefor arise. Since, as shown in Schedule "D" attached hereto, the employees have to their credit many years of seniority, the rights of severance pay have been built up over a good many years. For the Company now to seek to cancel its obligations is a clear violation of the vested property rights of said employees.

13. Article XII of the current collective bargaining agreement provides in part, with respect to vacations:

"Sec. 12.0. All regular employees shall be entitled to the following vacations with pay, which shall be based upon length of service, as follows:

(a) One (1) day vacation for each continuous month of service, as of July 1st of each year, up to a total of ten (10) consecutive days.

(b) Three (3) weeks consecutive vacation for continuous service of five (5) years or more.

(c) Four (4) weeks consecutive vacation for continuous service of twenty (20) years or more."

Vacation pay is deferred wages and since the employees have built up their rights to vacation pay based upon length of service, it is wrongful on the part of defendant Company to refuse to commit itself to make payment of the vacation [fol. 10] pay which has been earned by the employee during their years of service.

14. The collective bargaining agreement contains among other things, a Basic Crew Clause which provides for the retention of twenty-six (26) "jobs", (set forth more particularly in Exhibit "B" attached hereto)

" * * * The Company will not reduce by lay-off, the number of jobs in the collective bargaining unit to less than twenty-six (26) * * * "

(Exhibit B—Letter of April 8, 1960)

In violation of said obligation, the Company has terminated the "jobs" of all the former Interscience employees and failed and refused to continue said "jobs" and to obligate itself to continuance of same, with all the benefits and rights appertaining thereto.

15. Interscience commenced making its contributions to the District 65 Security Plan Pension Fund July 1, 1959, since which date the employees have built up vested property rights in the 65 Pension Plan. While the Company has informally advised the Union that its own pension system will be made applicable to the employees, the Company refused to contractually obligate itself so to do, and has advised the Union that any action on its part insofar as pension (or job security) is concerned, is purely voluntary and

gratuitous. In any event, the Pension benefits under the Company's plan are inferior to those under the 65 Pension Plan.

16. By reason of the Company's defaults, as herein set forth, the former Interscience employees are presently being compelled to make direct payments, out of their own funds, into the 65 Security Plan in order to continue their [fol. 11] health and welfare benefits; and they will have to do likewise with respect to Pension Fund benefits.

17. After the said consolidation, the job conditions of the former Interscience employees were changed and made more burdensome and said employees are, by reason of the Company's defaults, left remediless and without power to adjust their grievances.

18. Notwithstanding the broad language of the arbitration clause, Article XVI of Exhibit "A" (in part referred to in paragraph 11 *supra*), Interscience and the Company have failed and refused to comply with said contract and said grievance machinery and arbitration clause, and have failed and refused to arbitrate the issues herein referred to, namely:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

[fol. 12] Wherefore, plaintiff demands judgment directing that the defendant be compelled to submit to arbitration on the question herein referred to, and directing said defendant to proceed with said arbitration to final award, together with costs and disbursements of this action.

Weisman, Allan, Spett & Sheinberg, By Irving Rozen, A Member of the Firm, Attorneys for Plaintiff, Office & P. O. Address, 1501 Broadway, New York 36, New York.

[fol. 13]

EXHIBIT A TO COMPLAINT

o CONTRACT—INTERSCIENCE PUBLISHERS, INC.

with

DISTRICT 65

Substitute for Pages 1 & 2 of Mimeographed Agreement dated February 3rd, 1950.

AGREEMENT made as of this 1st day of February, 1960, by and between INTERSCIENCE PUBLISHERS, INC. and the INTERSCIENCE ENCYCLOPEDIA, INC., of 250 Fifth Avenue, New York City (hereinafter called the "Employer") and DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION-AFL-CIO, of 13 Astor Place, New York City (hereinafter called the "Union") for and on behalf of itself, its members now employed or hereafter to be employed by the Employer and collectively designated as "employees":

WITNESSETH:

In consideration of the mutual promises of the parties hereto, it is mutually agreed as follows:

ARTICLE I: RECOGNITION: BARGAINING UNIT; EXEMPTIONS.

Sec. 1.0. The Employer recognizes the Union as the exclusive bargaining agent of its clerical and shipping employees as defined in Sec. "1.1." The Employer also agrees

to recognize and deal with such representatives as the Union may elect or appoint, provided that only one (1) Shop Steward shall be designated for each of the Employer's locations. 250 Fifth Avenue, N.Y.C. shall be considered as one location.

Sec. 1.1. The bargaining unit shall consist of all clerical and shipping employees at the above location or at any [fol. 14] branch office of said location hereafter opened by the Employer in the Greater New York area. The following types and classes of persons employed by the Employer shall be excluded from the bargaining unit: Corporate officers and all executive, administrative, professional, supervisory, confidential and editorial personnel, irrespective of their titles or the duties of their positions. Corporate officers having confidential secretaries on February 1, 1960 shall be entitled to have confidential secretaries without limitation or restriction. Other corporate officers shall be entitled to confidential secretaries if a substantial part of the secretary's duties is of a confidential nature. Said excluded personnel are referred to hereinafter as persons in the Employer's "exempt" group. Whenever used in this agreement, the term "employee" shall mean and refer to only persons included within the above described bargaining unit.

Sec. 1.2. The Union agrees that, during the life of this agreement, it will not act as the representative of persons in the "exempt" group herein excluded from the bargaining unit.

Sec. 1.3. The Union shall accept into membership all employees who are included within the above defined bargaining unit, and the Union shall not discriminate in any manner against any employee otherwise eligible for membership, whether or not such employee formerly was or was not a member of the Union under previous agreements between the parties hereto.

ARTICLE II: CHECK-OFF.

Sec. 2.0. Upon written notice from the Union, the Employer will deduct all Union membership dues as provided

in the authorization form set forth below, upon condition that, at the time of such notice, the Union shall furnish the Employer with a written authorization executed by the employee in the following form:

[fol. 15] "I hereby authorize and direct my Employer, Interscience Publishers, Inc. (or Interscience Encyclopedia, Inc.) to deduct from my wages and to pay over to District 65, R.W.D.S.U., A.F.L.-C.I.O., on written notice from said Union, such amounts, including initiation fees and assessments regularly a part of membership dues (if any be owing by me) as my membership dues in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof or upon the termination of the collective agreement covering my employment (whichever is sooner), by written notice of such revocation, signed by me, received by my Employer not more than sixty (60) days before the required date."

Sec. 2.1. The employer will notify the Union promptly of any revocation of such authorization received by it.

ARTICLE III: UNION SHOP.

Sec. 3.0. All regular employees now in the bargaining unit, as defined in Article "I" of this agreement, and new employees, on and after thirty (30) days after this provision becomes effective or on and after thirty (30) days after the date of their employment, shall become and remain members of the Union in good standing during the life of this agreement as a condition of their employment, provided that the Employer shall not be required to carry out the foregoing provision in any manner that violates the provisions of the Labor-Management Relations Act of 1947, or any amendments thereof.

ARTICLE IV: NEW EMPLOYERS; HIRING; PROBATION.

Sec. 4.0. Whenever the Employer shall require new employees, it shall first offer employment to those of its em-

[fol. 16] ployees who may have been laid off, in accordance with the seniority provisions of this agreement.

Sec. 4.1. If the Employer shall require new employees in addition to those obtained pursuant to Section "4.0" hereof, it shall notify the Union of such need and the Union undertakes to supply available persons who have the qualifications and experience for the position to be filled, in accordance with the Employer's specifications.

Sec. 4.2. If the Union fails to supply qualified employees (the Employer to be the sole judge as to the qualifications and desirability of hiring any person referred to the Employer by the Union) within three (3) working days after such request was made, the Employer may engage such new employees from any other source. The exercise or non-exercise of judgment by the Employer with respect to the hiring or non-hiring of any specific person referred to the Employer by the Union shall not be arbitrable within the meaning of this agreement.

Sec. 4.3. The employment facilities of the employment office operated by the Union shall be made available to all persons, regardless of whether they are members of the Union or not, and, in operating such employment office and making referrals to the Employer, the Union will not discriminate against, restrain, or coerce any person because of his non-membership in the Union.

Sec. 4.4. All employees within the bargaining unit, as defined herein in Article "I", shall serve a probationary period of six (6) weeks, which period may be extended by the Union on request by the Employer, before he shall be considered a permanent or regular employee. During such probationary period, his employment may be terminated without notice by the Employer for any reason whatsoever. [fol. 17] Such termination of employment may not be made the subject of a grievance under the terms of this contract.

Sec. 4.5. Within one (1) week after hiring new employees, the Employer shall furnish to the Union a list of new employees hired. Likewise, the Employer shall furnish the names of all persons hired in its "exempt" group personnel.

ARTICLE V: PART TIME EMPLOYEES.

Sec. 5.0. Part time employees shall be entitled proportionately to holiday, vacation, sick-leave and other monetary fringe-benefits herein allowed to regular full-time employees. However, the same shall be allowed in the proportion that the average daily hours of work of the part-time employee bears to the established work-week for full-time employees.

ARTICLE VI: SENIORITY.

Sec. 6.0. The Employer shall establish and maintain a seniority list of regular employees, by name and date of employment—with the name of the employee having the longest length of service to be placed at the top of said seniority list. The names of all employees with shorter length of service shall follow the name of such senior employee, in order, until the name of the employee with the shortest length of service appears at the foot of the list.

Sec. 6.1. The names of employees whose trial or probationary periods have not expired shall not be placed upon the seniority list.

Sec. 6.2. In making promotions or filling vacancies, whenever practicable, such promotions or vacancies shall be made or filled by the Company from among its regular employees on this basis: The senior employee shall have the first opportunity for the position, provided that he is [fol. 18] then qualified and able to discharge the duties and responsibilities of the new position.

Sec. 6.3. In the event that the Employer decides that a reduction in force is required, the above principle of seniority, whenever practicable, shall apply, namely, the last person hired shall be the first to be separated from employment and laid-off, provided that the remaining employees then have the qualifications and ability to perform the required work.

Sec. 6.4. In rehiring, the same principle, wherever practicable, shall apply, namely, the last person laid-off shall be the first to be rehired, consistent with the principle, stated

above, that he shall then have the ability to perform the required work.

Sec. 6.4.1. The Employer shall be the sole judge of "practicability" and the "ability" of employees to discharge the duties and responsibilities of the position. None of its decisions in respect to the same shall be arbitrable.

Sec. 6.5. Should a laid-off employee fail to report to work within five (5) working days after ordinary mail notification (with a copy to the Union) by the Employer to so report, his seniority and employee status shall be terminated. The Employer shall be entitled to rely upon the last address of the employee shown on the Employer's employment record.

Sec. 6.6. The Shop Stewards appointed by the Union shall head the seniority list during their term of office only, provided they are able and are willing to perform the work assigned to them. The provisions of this section shall have no application in the making of promotions or in the assignment of vacations.

Sec. 6.7. Any employee permanently transferred or promoted from one position to another shall be given four [fol. 19] (4) weeks' probation in the new position, and, if he proves to the satisfaction of the Employer that he is able satisfactorily to perform the job duties, he will receive the rate of pay of that job. The Employer may request the Union for an extension of such 4 week period, and such request may not be unreasonably refused by the Union. If at the end of the four (4) weeks or extended probation period, as the case may be, the employee is found to be incapable of performing the new job, the employee, in the Employer's sole discretion, shall be returned to the position from which he was transferred, without loss of seniority.

Sec. 6.8. Five (5) working days' notice shall be given to employees before a lay-off occurs, and such notice shall be given to the Shop Steward and posted on the Bulletin Board.

Sec. 6.9. Employees who are laid off shall retain their seniority and right to reemployment for a period of six (6) months.

Sec. 6.10. The Employer shall have the sole right to determine the extent to which its establishments, in whole or in part, shall be operated or shut-down or its operations reduced or increased. No shut-down or reduction of operations because of reduction in volume, lack of sales, shortage of material, or other legitimate business reason, shall be deemed a lockout within the meaning of this agreement.

Sec. 6.11. Seniority rights under this Article shall be lost for the following reasons only:

- a. Voluntary quitting or resignation.
- b. Discharge for just cause.
- c. Failure to return to work as required in Sec. 6.5 hereof.
- [fol. 20] d. After a lay-off of 6 months.
- e. Absence from work for 3 or more consecutive days without giving adequate and timely written notice to the Employer and a reasonable excuse for such absence.

ARTICLE VII: DISCHARGES AND LAY-OFFS.

Sec. 7.0. The Employer retains the right to discharge or otherwise discipline employees for just cause. Except in situations involving gross misconduct (by way of example, but not in limitation thereof, such as deliberate disobedience of an order of a superior relating to company business, dishonesty, larceny, intoxication, fighting, or the commission of any crime or misdemeanor) before discharging the employee, the Employer immediately shall notify the employee, the Shop Steward and the Union of the proposed discharges. Within twenty-four (24) hours, both parties shall meet to discuss the same. Notwithstanding such meeting and irrespective of whether or not such a meeting is actually held, the Employer, at the expiration of such 24-hour period, may then discharge the affected employees.

Sec. 7.1. In the event of a disagreement between the Union and the Employer as to any discharge or other disci-

plinary action, it shall be submitted to arbitration, according to the provisions of this agreement.

Sec. 7.2. Should the Employer at any time deem it necessary to reduce the number of employees by lay-offs, reduction in staff, or discontinuance of certain lines of activity or business operations, it shall have the sole and unqualified right to take such action. The Employer agrees that all lay-offs occasioned by such action shall be in accordance with seniority, as provided for in Article "VI" of this agreement.

[fol. 21] **ARTICLE VIII: HOURS OF WORK; OVERTIME PAY.**

Sec. 8.0. The regular working hours under this agreement shall be 35 hours per week, 7 hours per day, 5 days per week, Monday to Friday, inclusive. Employees shall be entitled to the daily one (1) hour lunch period.

Sec. 8.1. Should any employee work more than 7 hours in any one day or more than 35 hours in any one week, he shall be paid for such overtime at the rate of time and one-half, except where such work constitutes make-up time. Work performed on Sunday shall be paid at the rate of double time. Employees working overtime who shall have worked two hours in the evening shall receive \$2.50 as supper money. Employees who are required to, and actually work, all day on Saturday, shall receive \$2.50 as luncheon money. If requested to work overtime, employees will be expected to do so unless he or she is excused for good cause. Employees shall not have the right to refuse reasonable requests by the Employer for overtime work. Any claim by an employee that he or she has been required to work unreasonable or excessive overtime may be made the subject of a grievance. However, nothing in this agreement shall be construed as a limitation on the Employer's part to require overtime work. The Employer may contract work out or use any other means available to it to perform the same whenever any part of the regular work force is not available or has refused to perform overtime work within the time required by the Employer.

ARTICLE IX: MINIMUM WAGES.

Sec. 9.0. Effective as of February 1, 1960, employees shall be paid no less than the minimum rates of pay for their respective job classifications, as set forth in Appendix "A", attached hereto.

[fol. 22]

ARTICLE X: WAGE INCREASE; COST OF LIVING CLAUSE.

Sec. 10.0. Effective as of February 1, 1960, all regular employees shall be paid a wage increase of \$3.00 per week. Effective as of February 1, 1961, all regular employees shall be paid a wage increase of \$2.00 per week.

Sec. 10.01. There shall be a single cost of living review of wages as of February 1, 1961. If on February 1, 1961, the Consumer Price Index for New York City as established by the Bureau of Labor Statistics of the United States Department of Labor reveals an increase over the index as of February 1, 1960, the effective date of this contract, i.e. 124.1, the wages of all employees shall be increased by the same percentage as the index has risen, but not more than \$1.00 per worker.

The increase, if any, provided for under this paragraph shall be computed on the average wage of the employees on February 1, 1960, but none shall be paid if the increase would amount to less than \$.50 per worker.

ARTICLE XI: HOLIDAYS AND HOLIDAY PAY.

Sec. 11.0. Subject to the terms of Section "11.3", the Employer agrees to pay the employees full daily salary for the following standard eight (8) holidays, as if they worked thereon:

1. New Year's Day
2. Washington's Birthday
3. Decoration Day
4. Independence Day
5. Labor Day

6. Election Day
7. Thanksgiving Day
8. Christmas Day

[fol. 23] Sec. 11.1. The following religious holidays will be observed:

1. The Jewish Day of Atonement as a holiday for all employees;
2. The first and second days of the Jewish New Year for Jewish employees;
3. Provided neither of the Jewish New Year holidays falls on a Saturday or a Sunday, non-Jewish employees shall have Good Friday and another Christian holiday to be designated. If one or both of the Jewish New Year holidays falls on a Saturday or a Sunday, non-Jewish employees shall have only Good Friday.

Sec. 11.2. All eight (8) standard holidays shall be paid for, irrespective of the day of the week on which they fall; a religious holiday falling on a Saturday or Sunday shall not entitle employees to holiday pay or to a day off on a business day.

Sec. 11.3. Temporary employees shall be entitled to holiday pay for any holidays that fall on or are observed during such temporary employment.

ARTICLE XII: VACATIONS.

Sec. 12.0. All regular employees shall be entitled to the following vacations with pay, which shall be based upon length of service, as follows:

- a. One (1) day vacation for each continuous month of service, as of July 1st of each year, up to a total of ten (10) consecutive days.
- b. Three (3) weeks consecutive vacation for continuous service of five (5) years or more.

[fol. 24] c. Four (4) weeks consecutive vacation for continuous service of twenty (20) years or more.

Sec. 12.1. Eligibility for vacations and vacation pay shall be determined as of July 1st of each year and all vacations shall be scheduled sometime between June 1st and September 15th, unless otherwise mutually agreed.

Sec. 12.2. Where employees leave the Employer's employ, pro-rata vacation pay shall be awarded only as follows:

- a. Employees who were discharged (except for gross misconduct) or laid off, shall receive their pro-rata vacation pay.
- b. Employees who voluntarily resign shall likewise receive their pro-rata vacation pay, provided they have given the Employer two (2) weeks' written notice of their intention to resign.

Sec. 12.3. Should a standard holiday occur during the vacation period of any employee, such employee shall be entitled to one (1) additional day of vacation.

Sec. 12.4. All vacations shall be taken by individual employees on consecutive days and vacations shall not be split into more than one (1) consecutive period of time, except by prior arrangement, in writing, signed by an officer of the Employer.

ARTICLE XIII: SICK LEAVE.

Sec. 13.0. All regular employees shall be entitled to sick leave with pay at the rate of twelve (12) days per contract year beginning February 1 of each year of this agreement. In those instances, where an employee has not used the full amount of his sick leave allowance of twelve (12) days for the period beginning February 1, 1959, and ending January [fol. 25] 31, 1960, and, where such employee has an unused balance of six (6) or more days of sick leave for that period, such unused balance of sick leave (to the extent of only six (6) days) shall be added to the regular sick leave allowance

of twelve (12) days for the contract year beginning February 1, 1960. In like manner, such unused balances of sick leave to the extent of only six (6) days shall be added, where required, to the regular sick leave allowance for the contract year beginning February 1, 1961. In no instance shall such an employee be entitled to more than eighteen (18) days of sick leave with pay during any contract year. In case of an extended illness, the Employer shall grant a sick employee a leave of absence, without pay, not in excess of three (3) months, providing that reasonable written proof of such extended illness is submitted to the Employer. If such extended illness continues beyond said three (3) months, no further leaves of absence shall be granted and the Employer shall have the right to regard such employee as having voluntarily quit his job.

Sec. 13.1. When an absence for illness extends beyond three (3) days, the employee shall present, upon his return to work, a satisfactory and reasonable proof of such illness.

Sec. 13.2. In the event of a death or similar emergency, such as acts of God, affecting a parent, spouse or child of an employee, the Employer in its sole discretion shall grant such employee an emergency leave of absence of not more than three (3) days per year, which emergency leave of absence shall not be charged against the employee's sick leave allowance.

Sec. 13.3. An employee who finds it necessary to be absent from work shall notify the Office Manager or her Department Head by telephone prior to 11 A.M. of that day.

ARTICLE XIV: MATERNITY LEAVE.

[fol. 26] Sec. 14.0. Whenever an employee shall become pregnant, she shall give prompt written notice thereof to the Employer. Whenever requested by the Employer, such employee should furnish a certificate from her physician stating: The approximate date of delivery; that she may continue to perform the duties of her current position; and the length of time she may continue to perform such work.

Sec. 14.1. At any time after the fifth month of pregnancy, the Employer, in its sole discretion, may require a pregnant employee to take a maternity leave without pay, or, at any time prior to the fifth month of pregnancy, such an employee may apply for such a leave of absence, without pay. In any case, the leave shall continue for no longer than nine (9) months.

Sec. 14.2. Upon returning to work after her delivery, such an employee shall be reinstated to her former position at her salary rate in effect at the beginning of her leave, together with any general wage increases granted to the entire bargaining unit during her absence. Seniority credit shall not accumulate during the period of any such leave of absence, that is, wherever in this agreement any employee benefit or right is measured by length of service, the duration of a maternity leave shall be deducted in computing the employee's total length of service or employment by the Employer. During any such leave of absence, the Employer may hire "temporary" employees as replacements, and said "temporary" employees, irrespective of the length of time employed in such "temporary" work, shall be discharged upon the return to work of the employee granted such maternity leave. Upon the latter's return to work within the time required, she shall be re-employed at her former position, provided she can resume and properly perform the duties of the position in which she was regularly employed at the time of the commencement of her leave. In [fol. 27] any event, the failure of such an employee to return to work upon the expiration of nine (9) months of Leave of Absence shall be deemed a voluntary resignation, which shall deprive such employee of her status as an employee, without recourse.

Sec. 14.3. All maternity leaves authorized by the Employer shall be in writing and signed by an officer of the Employer. The failure of any employee to comply with any of the provision of this article pertaining to pregnancy and maternity leaves shall be considered and deemed a resignation by such employee and as a voluntary abandonment of her employment without recourse.

Sec. 14.4. An employee who has been granted a maternity leave of absence shall be considered as having quit and resigned her position without notice, and her employment shall be deemed to have been terminated, if, while on such leave of absence, she engages in or applies for other employment without the written consent in writing of the Employer herein. Any employee who obtains a maternity leave of absence through fraud or misrepresentation shall be subject to discharge by the Employer without recourse of such employee to the grievance or arbitration provisions of this agreement.

Sec. 14.5. The foregoing provisions of this Article shall apply only to those employees who have been employed by the Employer for a period of eighteen (18) months or more. Employees with less than eighteen (18) months of service shall not be entitled to maternity leaves and shall not be entitled to reinstatement rights.

ARTICLE XV: WELFARE SECURITY BENEFITS.

Sec. 15.0. Effective February 1, 1960 the Employer shall pay to the "65 Security Plan" 9% of the total wages of all employees covered by this agreement inclusive of overtime, [fol. 28] bonuses, incentives and commissions up to and including a maximum of total wages per employee of \$8,000.00 per annum, provided however, that the Employer shall have the benefit of the most favorable adjustment made available by the Plan to any other employer. In addition to the quarterly reports to be submitted by the Employer as provided in Section 15.1 hereof, the Employer shall submit to the "65 Security Plan" copies of W-2 Forms prepared by it for submission to the Internal Revenue Service covering earnings of employees covered by this agreement.

Sec. 15.1. Payments shall be made four (4) times per year on a quarterly basis, on or before the 15th day of January, April, July, or October, for the preceding quarter. A deposit equal to one quarterly payment shall be made with the 65 Security Plan at the inception of this agreement and shall remain on deposit during its lifetime. The deposit may be adjusted when necessary to conform with

fluctuations in the payroll, and it shall be returned to the Employer at the termination of this contract.

Sec. 15.2. The Union represents and warrants that the said "65 Security Plan" is now and shall at all times be administered pursuant to a trust agreement executed jointly by equal representatives of the Union and of representatives of Employers having collective bargaining agreements with the Union. The Union further represents and warrants that said "65 Security Plan" now provides for benefits to its members who are employed by the Employer herein, based upon the Employer's contribution as is set forth in the attached Exhibit "I", captioned "65 Security Plan in Brief."

Sec. 15.3. The Union represents and warrants that during the life of this agreement the minimum benefits insuring to the benefit of Employer's employees shall be the benefits referred to in Section "15.2" herein, and that said minimum [fol. 29] benefits shall not be decreased or diminished, or in any manner abrogated by the Trustees of the "65 Security Plan" or by the Union, without first obtaining the written consent thereto by the Employer, which consent the Employer agrees it will not unreasonably withhold.

Sec. 15.4. It is expressly understood and agreed that the Employer's sole financial obligation hereunder shall be the payment of contributions at the rate set forth in Section "15.0" and no more, irrespective and notwithstanding any of the terms or provisions contained in the Agreement and Declaration of Trust establishing the "65 Security Plan".

Sec. 15.5. The Union agrees that it will cause the Trustees of the "65 Security Plan" to give written notice to the Employer, or that the Union itself will give notice to the Employer concerning (1) any and all deaths, resignations, incapacitations or resignations or removals from office, or any other changes affecting the status or composition of current Employer Trustees; (2) any changes of insurance carriers or modifications of insurance policies; and (3) any change of any benefits or insurance coverages. In addition, the Union agrees that it, or the said Trustees, will furnish to the Employer a copy of the statement showing the re-

sults of the most recent annual audit prepared by the Plan's certified public accountant, together with copies of similar future statements, as prepared, whether annually or oftener.

Sec. 15.6. In the event that legislation is enacted by the Federal or State or municipal governments, levying a tax or other exaction upon the Employer for the purpose of establishing a federally, state or municipally administered system of life, health and accident, or hospitalization or medical insurance, under which the employees of the Employer are insured, the Employer shall be credited, against the sums payable under "Section 15.0" hereof, for each pay [fol. 30] period, with the amount of such tax or exaction payable by it for such pay period.

Sec. 15.7. In case of any failure to pay the amount due within the time prescribed, there shall be added to the installment payment due 5% of the amount due, if the failure is for not more than 30 days; with an additional 5% for each additional 30 days or fraction thereof, during which such failure continues, not exceeding 25% of the aggregate. The amount so added to any installment payment due shall be collected at the same time and in the same manner and as part of the payment due unless the payment shall have been made before the discovery of the neglect and failure, in which case the amount so added shall be collected and become due in the same manner as the installment payment. However, it is agreed that one month's delinquency shall be waived in the first instance of delinquency, and that the Employer may apply to the Board of Trustees for waiver of any additional payment as provided herein for just cause. The amounts provided for herein to be added to the installment payment shall be deemed and are considered as liquidated damages and shall be in payment of the cost and expense in effectuating collection of the said installments, the cost of enforcement of the agreement and of any interest which may accumulate by reason of late payment.

Sec. 15.8. The Employer further, agrees to submit with each payment a list of all employees covered by this agreement, showing quarterly earnings of each employee, and

such other payroll information as may be required by The 65 Security Plan Office to guarantee the sound and efficient operation of the plan. The Security Plan Office shall have the right to examine payroll records of the Employer pertaining to said payments.

[fol. 31] Sec. 15.9. The 65 Security Plan agrees to provide the Employer semi-annually, on request, with a report of receipts and disbursements including benefits paid out.

Sec. 15.10. The agreements contained in this Article shall be considered as of the essence of this contract.

ARTICLE XVI: GRIEVANCES: ADJUSTMENTS OF DISPUTES: ARBITRATION.

Sec. 16.0. Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, herein after referred to as "grievance":

Step 1: The grievance, when it first arises, shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department. The grievance shall be presented orally. If, at this step, the grievance is resolved to the mutual satisfaction of the parties, a memorandum stating the substance of the settlement shall be prepared and signed by the Employer representative and the affected employee. Copies of the same shall be furnished to the Union's Shop Steward and the Employer. In the event that the grievance is not satisfactorily settled within two (2) working days after the conclusion of the conference stated above, the grievance shall be reduced to writing. It shall state the nature of the claim made and the objections raised thereto and shall be signed by the Employer representative and the affected employee.

Step 2: Within five (5) working days thereafter, the grievance shall be the subject of a conference between an

[fol. 32] officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union, at which conference the parties will endeavor to resolve and settle the grievance.

Step 3: In the event that the grievance shall not have been resolved or settled in "Step 2", the grievance shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union. All grievances not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by Employer and the Union.

Sec. 16.1. In the event that the parties fail to agree upon an impartial arbitrator, as provided in "Step 3", the impartial arbitrator, by the filing of a demand for arbitration by the aggrieved party, shall be selected and designated by the American Arbitration Association, pursuant to whose Rules for its Voluntary Labor Arbitration Tribunal, any and all arbitrations shall be conducted.

Sec. 16.2. The arbitrator finally designated to serve in that capacity, after receiving a written statement signed jointly by the Employer and the Union certifying to his selection and designation as aforesaid and containing a concise statement of the issue involved, shall conduct the arbitration in accordance with the Arbitration Law of the State of New York. The decision of the Arbitrator shall be final and binding upon the parties. All expenses incidental to the arbitrator's services, if any, shall be borne equally by the Employer and the Union.

Sec. 16.3. It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision.

[fol. 33] Sec. 16.4. It is expressly agreed that there shall be no strike, slow-downs or suspension of work of any nature while a grievance is in the process of negotiation and disposition under the grievance and arbitration procedures of this Article.

Sec. 16.5. It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

- (1) the amendment or modification of the terms and provisions of this agreement;
- (2) salary or minimum wage rates as set forth herein;
- (3) matters not covered by this agreement; and
- (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement.

Sec. 16.6. The status in effect prior to the assertion of a grievance or the existence of any controversy or dispute shall be maintained pending a settlement or decision thereof. Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance.

Sec. 16.7. Nothing contained in this Article shall be deemed to be a restriction or limitation of the rights of the Employer, or the Union, or an individual employee, or a group of employees, as specified in Section 9(a) of the Labor Management Relations Act, 1947, as amended. However, whenever any meetings or conferences are held with the Employer during business hours, the Union's employee-[fol. 34] representatives shall be limited to only two (2) employees. During negotiations for the renewal of this agreement, the Union's negotiating committee shall be limited to no more than three (3) employees. Except in emergency situations, employees shall not discuss grievances with Stewards during regular working hours.

Sec. 16.8. Grievances or disputes arising out of this agreement shall not be combined or accumulated and sub-

mitted as a part of one case or arbitration proceeding. Accordingly, no arbitrator shall have the authority to hear or determine more than one (1) grievance, unless several grievances arise out of the same common state of facts, and are relevant and germane to one another. Whenever any provision in this agreement reserves to the Employer the right to exercise its sole discretion or judgment with respect to specific subjects, events, matters or situations, the exercise or non-exercise of such discretion or judgment shall not be arbitrable.

Sec. 16.9. Except for threatened breaches or actual breaches of the provisions of Article "25" of this agreement, the arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. The waiver of all other remedies and forums herein set forth shall apply to the parties hereto, and to all of the employees covered by this contract. No individual employee may initiate an arbitration proceeding.

[fol. 35] ARTICLE XVII: THE UNION AS THE BARGAINING REPRESENTATIVE.

Sec. 17.0. The Union shall require its members to comply with the terms of this agreement. The parties agree that the maintenance of a peaceable and constructive relationship between them and between the Employer and the employees requires the establishment and cooperative use of the machinery provided for in this contract for the discussion and determination of grievances and disputes, and that it would detract from this relationship if individual employees or groups of employees would either, as such individuals or groups, seek to interpret or enforce the contract on their own initiative or responsibility. It is, therefore, agreed that this contract shall not vest or

create in any employee or group of employees covered thereby any rights or remedies which they or any of them can enforce either at law, equity, or otherwise, it being understood and agreed, that all of the rights and privileges created or implied from this contract shall be enforceable only by the parties hereto and only in the manner established by this contract.

Sec. 17.1. Union business and activity shall not be conducted at any time on the Employer's premises either during, or after business hours, it being the intention of this provision to prohibit the holding of meetings or the congregation of employees in any part of the Employer's establishments at any time.

ARTICLE XVIII: MANAGEMENT RIGHTS: EFFICIENT OPERATION.

Sec. 18.0. Nothing in this agreement shall limit the employer in the exercise of its function of management under which it shall have, among others, the rights: to hire new employees and to arrange and direct its entire working forces and allocate and determine the time, place and [fol. 36] manner of work; to discipline or discharge employees for just cause; to transfer or lay off employees because of lack of work or for other legitimate reasons; to decide the number and location of its establishments, its operations, policies and the services, products or goods to be handled, processed, manufactured or sold; and the methods and schedules of work, including the means, methods, techniques and processes of operation, as well as the establishment of new departments and the relocation, discontinuance or closing of existing departments or portions thereof, or any establishment now or hereafter operated by it, *provided* that the Employer shall not use these prerogatives for the purpose of discrimination or contrary to the specific terms of this agreement. It is expressly understood that the enumerations in this Article of management rights and prerogatives reserved shall not be deemed to exclude other prerogatives of rights not enumerated.

Sec. 18.1. The Employer shall have the right to promulgate reasonable rules and regulations to maintain discipline and control and use of its premises and to govern the work, conduct and safety of employees, *provided* the same are not inconsistent with the provisions of this agreement.

Sec. 18.2. The Union recognizes that the Employer has the right to require from its employees efficient service in the performance of their duties and that, in the interpretation of this agreement, recognition shall be given to the necessity for the efficient and economical operation of the Employer's business. The Union also recognizes that the determination of the organization of each branch and department of its establishments, the determination of policies affecting the selection and work assignment of its entire personnel and staff, as well as the establishment of quality and performance standards and the judgment of workmanship required, likewise are rights vested exclusively in the Employer.

[fol. 37]. Sec. 18.3. Employees shall not perform services, directly or indirectly, for any person, firm or corporation in direct competition with any phase of the Employer's business, without the permission of the Employer.

ARTICLE XIX: COOPERATION.

Sec. 19.0. The Employer and the Union agree to cooperate to reduce absenteeism and lateness, to prevent waste or destruction, to eliminate frivolous grievances and to enforce this agreement.

ARTICLE XX: BULLETIN BOARD.

Sec. 20.0. The Employer shall provide space for a bulletin board in a reasonably accessible place for union notices. The union agrees that this right shall not be abused, and that this bulletin board will not be used for political notices or purposes.

ARTICLE XXI: MINORS.

Sec. 21.0. It is agreed that no minor under the age of 18 years shall be employed by the Employer.

ARTICLE XXII: MILITARY SERVICE.

Sec. 22.0. Employees who have left the employ of the Employer to enter the Armed Services of the United States, shall be returned to work and granted all reemployment rights and privileges occurring in their favor, in accordance with the Federal Selective Training and Service Act, as amended.

ARTICLE XXIII: SEVERANCE PAY.

Sec. 23.0. Employees (1) discharged for cause, as limited below, and not thereafter rehired or reinstated, or (2) who are laid off by the employer for an indefinite period of [fol 38] time, or for a specific period of more than thirty (30) days, and who have rendered at least six (6) months continuous service with the employer, shall receive severance pay, as follows:

Over six (6) months and under one year of continuous service	1 week
Over one (1) year and under two years of continuous service	2 weeks
Over two (2) years and under four years of continuous service	3 weeks
Over four (4) years and under seven years of continuous service	4 weeks
Over seven (7) years and under ten years of continuous service	5 weeks
Over ten (10) years of continuous service	6 weeks

Severance pay shall be computed on the basis of the employee's regular weekly rate of pay in effect at the time of such layoff.

Sec. 23.1. Employees (1) discharged for cause prior to the completion of one (1) year of continuous service, or (2) who are at any time "discharged for gross misconduct", as defined by Sec. 7.01, or (3) who at any time voluntarily resign, shall not be entitled to severance pay. However, when a voluntary resignation is caused by marriage or pregnancy or permanent retirement from the labor market or permanent physical disability, such a resignation shall entitle the employee to severance pay, computed at the applicable rate set forth in Section "23.0" and provided that such employee submits to the Employer reasonable and sworn written proof stating the facts causing the resignation. Whenever such a resignation results from marriage [fol. 39] or pregnancy or permanent retirement from the labor market, severance pay shall be payable three (3) months after the effective date of such resignation. When such a resignation results from permanent physical disability severance pay shall be payable on the effective date of such resignation.

ARTICLE XXIV: EFFECTIVE DATE.

Sec. 24.0. Except as otherwise provided for in Sections "9.0" and "10.0", this agreement shall go into effect as of February 1, 1960, and shall continue in full force and effect for a term of two (2) years ending January 31, 1962; and it shall automatically be renewed from year to year thereafter to February 1st of successive years, unless notifications be given in writing by either party to the other, by registered mail, at least sixty (60) days prior to the expiration of this agreement; that changes in the agreement are desired.

ARTICLE XXV: STRIKES AND LOCKOUTS.

Sec. 25.0. No strikes, sympathetic strikes, picketing, lockouts, slowdowns, stoppages of work, or boycotts of any nature by the Union or any of its members, or lockouts by the Employer, shall take place during the term of this agreement.

ARTICLE XXVI: GUARANTEES; NO REDUCTION IN RATES.

Sec. 26.0. There shall be no reduction in the rate of pay of any employee; nor shall any employee be dismissed as a consequence of the making of this agreement, except for breaches thereof.

ARTICLE XXVII: No DISCRIMINATION; NO COERCION.

Sec. 27.0. The Employer will not interfere with, restrain, or coerce the employees covered by this agreement because of membership in or activity in behalf of the Union. [fol. 40] The Employer will not discriminate in respect to hire, tenure of employment, or any term or condition of employment against any employee covered by this agreement because of membership in or activity on behalf of the Union, nor will it discourage or attempt to discourage membership in the Union or attempt to encourage membership in another Union.

Sec. 27.1. The Union will not restrain or coerce (a) employees in the exercise of their rights of self-organization; to bargain collectively, and to engage in other concerted activities or to refrain from any or all such activities; or (b) the Employer in its selection of representatives for the purposes of bargaining or grievance settlement. The Union will not cause the Employer to discriminate against employees by reason of employees exercising or refraining from exercising their rights mentioned above; nor will the Union cause the Employer to discriminate against an employee whose membership in the Union has been denied or terminated on some ground other than his failure to tender periodic dues and reasonable and non-discriminatory initiation fees, nor will the Union and its members (whether employed by the Employer or elsewhere) interfere with, restrain, coerce, intimidate harass employees who are not members of the Union.

ARTICLE XXVIII: MODIFICATION.

Sec. 28.0. It is specifically understood that this agreement may not be modified by an employee or group of

employees without the joint consent in writing of the Union and the Employer.

ARTICLE XXIX: UNION VISITATION.

Sec. 29.0. It is agreed that a duly accredited representative of the Union shall, on notice to and with the permission of, the Company, be entitled to access to the Em-[fol. 41] ployer's establishments during the regular working hours for the purpose of investigating and adjusting complaints and grievances. Said representative shall not during his visits hinder or interfere with the work of employees or any of the Company's operations. The company shall provide a place in which the Union's representative may consult in private with Union stewards for a reasonable period of time.

ARTICLE XXX: EXCLUSIVENESS OF AGREEMENT:

APPLICABLE LAW: TERMINOLOGY.

Sec. 30.0. This agreement and each of its provisions, together with the appendix "A" and Exhibit I, referred to herein, contain and embody the whole agreement of the parties, and it is agreed that there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein.

Sec. 30.1. This agreement and all of its terms and conditions shall be subjected to any and all applicable laws of the State of New York and the United States of America and the regulations of any State or Federal governmental agency having jurisdiction over the business and affairs of the Employer or the subject matter contained in this agreement.

Sec. 30.2. The use of the masculine in this contract shall include the feminine as well. The use of the singular shall include the plural as well. "Employer" where used shall mean and refer to both corporate employers who are parties hereto. Wherever used, the term "employee" shall mean and apply only to the Employees in the above-described "bargaining unit".

[fol. 42] IN WITNESS WHEREOF, the parties hereto have interchangeably caused their duly authorized representatives to execute the within agreement the day and year first above written.

INTERSCIENCE PUBLISHERS, INC.

INTERSCIENCE ENCYCLOPEDIA, INC.

By C. J. MOSBACHER, JR.

Vice President

DISTRICT 65, RETAIL, WHOLESALE

DEPARTMENT STORE UNION, A.F.L.-C.I.O.

By ALBERT R. TURBANE

Organizer

ANNA LION, Steward

[fol. 43]

APPENDIX A, ANNEXED TO EXHIBIT A

Job Classification

Grade	Minimum Salaries	1960-61	1961-62
I — Clerks—with following skills—			
Stock-Mail			
Typist			
Filing			
Billing		66.50	68.50
I(a)—Clerks—with following additional skills			
Relief Switchboard Operator			
Relief Machine Operator			
Relief Typist and Varitypist		69.50	71.50
II — With following skills			
Stenographer I			
Typist and Varitypist			
Production Assistant			
Illustration Assistant			

Promotion Assistant
 Assistant Subscription Clerk
 Assistant to Order Analyzer
 Assistant Bookkeeper
 Machine Operator

71.50 73.50

III —With following skills—

Order Analyzer
 Receptionist-Typist-Switchboard
 Operator
 Stenographer II

76.50 78.50

IV —Bookkeeper

Chief Subscription Clerk

81.50 83.50

CLERK'S NOTE RE EXHIBIT I, ANNEXED TO EXHIBIT A

65 Security Plan in Brief

Same as Exhibit annexed to Affidavit of Irving Rozen
 printed herein at pages 49-50.

[fol. 44]

EXHIBIT B TO COMPLAINT

INTERSCIENCE PUBLISHERS, INC.

250 Fifth Avenue, New York 1, N. Y.

LEXINGTON 2-1727

Executive Offices

April 8, 1960

District 65, AFL-CIO

RWSDU

13 Astor Place

New York 3, New York

RE: Interscience Publishers, Inc.

Gentlemen:

We confirm our statement that during the term of the collective bargaining agreement in effect as of February 1,

1960 the Company will not reduce by lay-off the number of jobs in the Collective Bargaining Unit to less than twenty-six (26). Absentees for vacation, sickness, etc. shall be deemed employed. Open positions for which qualified help is being sought shall be deemed filled jobs. Nothing herein shall affect the right of the employer to discharge or discipline for cause.

If, however, at any time during the term of the collective bargaining agreement, the Company should consider that the foregoing would cause it hardship, or would be inequitable or uneconomic, the Union and the Company will leave to arbitration how many jobs in the Collective Bargaining Unit (twenty-six (26) or less) are to be maintained by the Company.

[fol. 45] We also confirm our agreement that prior to any future appointment of an "assistant to department head" there shall be a discussion with the Union steward and the committee concerning the duties to be performed.

Very truly yours,

INTERSCIENCE PUBLISHERS, INC.

/s/ C. J. MOSBACHER, JR.
C. J. Mosbacher, Jr.
Vice President

CJMjr/vfb
cc: Mr. Lieb

[fol. 46]

EXHIBIT C TO COMPLAINT

INTERSCIENCE PUBLISHERS, INC.
250 Fifth Avenue, New York 1, N. Y.
LEXINGTON 2-1727

Executive Offices**March 6, 1961****District 65, A.F.L.-C.I.O.****Retail, Wholesale and Department
Store Union****13 Astor Place
New York 3, New York****Attention: Mr. Al Turbane, Organizer****Gentlemen:**

In accordance with your request, we are willing to modify Section 2.0 of the existing contract between Interscience Publishers, Inc. and the Union. This section will be amended to read as follows:

Sec. 2.0. Upon written notice from the Union, the Employer will deduct all Union membership dues as provided in the authorization form set forth below, upon condition that, at the time of such notice, the Union shall furnish the Employer with a written authorization executed by the Employee in the following form:

"I hereby authorize and direct my employer to deduct from my wages and to pay over to the Union on notice from the Union such amounts including initiation fees and assessments (if any owing by me) as my membership dues in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any [fol. 47] anniversary date hereof by written notice signed by me of such revocation; received by my Employer and the Union, by registered mail, return receipt requested,

not more than sixty (60) days and not less than fifty (50) days, before any such anniversary date, or on termination date of the collective bargaining agreement covering my employment, by like notice prior to such termination date, whichever occurs the sooner."

This letter is being sent to you in duplicate; please sign and return one copy to us so that we may incorporate it as part of the contract. The second copy, which we have already signed, should be incorporated into your master copy of the contract.

Very truly yours,

INTERSCIENCE PUBLISHERS, INC.

/s/ C. J. MOSBACHER, JR.
C. J. Mosbacher, Jr.
Vice President

CJMjr/vfb

FOR DISTRICT 65, RWDSU, AFL-CIO:
ALBERT R. TURBANE

[fol. 48]

EXHIBIT D TO COMPLAINT

Names re. Seniority	Date emp. began	Duration of service	Age	Salary
Hazel Sinclair, Clerk, Bkkr.	5/25/50	11-1/3 years	11/14	\$ 87.95
Anna Lion, Asst. Bkkr.	11/22/50	10-5/6 "	3/01	\$104.45
Margit Porias, Head Order D.	8/17/51	over 10 "	6/27	\$123.95
Anne Evans, Order An'yst.	8/13/51	" 10 "	4/25	\$ 87.95
Margarita Toro, Bkkr.	10/ 1/51	approx. 10 "	12/27	\$ 90.45
Louis Druker, Mailing	10/25/51	" 10 "	8/01	\$ 86.95
Anna Goldstein, Filing	12/10/51	9-5/6 "	1/11	\$ 88.45
Adelaide Prenner, Filing	11/ 3/54	7-1/2 "	8/03	\$ 88.95
Sophie Druker, Production	8/15/55	over 6 "	11/04	\$ 94.70
Clodeaner Smalls, Order	8/ 2/56	" 5 "	9/25	\$ 97.20
Ester Weinstein, Editl.	8/ 6/56	" 5 "	12/05	\$ 92.70

Names re. Seniority	Date emp. began	Duration of service		Age	Salary
Ester Gilbert, Switchbd.	11/12/56	approx.	5 years	6/27	\$ 98.95
Ester Rothberg, Hd. Bkpr.	3/ 4/57		4-1/2 "	6/05	\$124.45
Janet Murray, Subscription	4/ 5/57		4-1/2 "	7/02	\$121.95
Hoyt Peters, Promotion	4/10/57		4-1/2 "	3/27	\$ 90.95
Sadie Brown, Sec. to Mr. K.	2/28/58		3-2/3 "	7/20	\$ 96.00
Herbert Hart, Mailing	1/ 5/59		2-5/6 "	10/32	\$ 78.70
Bernice MacFarlane, Sec. Mrs. O.	3/ 9/59		2-1/2 "	12/24	\$ 98.70
Loretta Baer, Production	6/18/59		2-1/3 "	6/39	\$ 82.70
Inez Oliveri, Bkpr.	9/14/59		2 "	1/37	\$ 81.00
D. Lela Calabro, Order	10/ 9/59	Approx.	2 "	1/35	\$ 86.00
Evelyn Shinohara, Editl.	10/21/59	"	2 "	10/13	\$ 81.00
Europa MacIntosh, Order.	12/ 3/59		1-2/3 "	11/20	\$ 97.00
Florence de Sola, Bkpr.	5/24/60		1-1/2 "	5/30	\$ 83.00
Jimmie Brown, Editl.	6/ 6/60		1-1/2 "	3/34	\$ 80.00
Hannah Robins, Subscr.	10/17/60		1 "	—	\$ 78.00
Beaie Micucci, Steno.	10/ 1/60		1 "	1/11	\$ 78.00
Hazel Levson, Production [fol. 49]	11/ 2/60	less	1 year	9/59	\$ 83.00
Vernon Brown, Editl. Typ.	12/ 5/60		10 months	10/18	\$ 78.00
Doris Hutton, Sec. Dr. I.	1/ 5/61		9 "	—	\$ 93.00
Ed. Peele, Typist	2/20/61		7 "	—	\$ 75.00
Helen Parham, Steno.	4/21/61		5 "	10/33	\$ 85.00
Irene Stein, Production	5/15/61		4-1/2 "	4/35	\$ 85.00
Denise Kojichin, Prom. Typ.	6/ 5/61		4 "	—	\$ 80.00
Lila McGuire, Steno.	7/14/61		2-1/2 "	—	\$ 90.00
Irene Polan, Typist	8/ 2/61		2 "	—	\$ 70.00
Mary Anderson, Typist	8/ 3/61		2 "	—	\$ 85.00
Mary Morrison, Typist	8/ 7/61		2 "	—	\$ 75.00
Carmen Garcia, Typist	8/21/61		1 "	4/31	\$ 75.00
I. Rosenberg, Promotion	9/14/61				\$ 90.00

[fol. 50]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ORDER TO SHOW CAUSE—January 24, 1962

Upon the annexed petition of David Livingston, as President of District 65, R.W.D.S.U., AFL-CIO, (hereinafter called the "Union"), duly verified the 24th day of January, 1962, and upon the exhibits annexed hereto, and upon all the papers and proceedings had herein, it is

Ordered, that John Wiley & Sons, Inc., the defendant herein, show cause at a Motion Term of this Court to be held at the United States Courthouse, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 30th day of January, 1962, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made directing that said Company submit to arbitration with the said Union on the following issues:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

[fol. 51] (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract;

and directing said Company to proceed with arbitration to final award; and why the Union should not have such other and further and different relief as to this Court may seem just and proper in the premises; and it is further

Ordered, that the Company serve answering affidavits, if any, upon the Union, one day prior to the return date hereof; and

Sufficient reason appearing therefor, let the service of a copy of this Order, together with a copy of the papers upon which the same is granted, upon Paskus, Gordon & Hyman, Attorneys for the Company, of 733 Third Avenue, New York 17, New York, on or before the 25th day of January, 1962, be deemed sufficient.

Dated: New York, N. Y., January 24, 1962.

Richard N. Levett, U.S.D.J.

[fol. 52]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

PETITION

The petition of David Livingston, as President of District 65, R.W.D.S.U., AFL-CIO, respectfully shows:

1. Petitioner, hereinafter called "Union" is a labor organization with offices at 13 Astor Place, City, County and State of New York, with a membership upwards of 30,000 individuals and is in collective bargaining relationship with upwards of 2,000 employers in and about the City of New York.

2. Attached hereto and marked "Exhibit 1" is a Copy of the Complaint herein, and all the allegations of said complaint are hereby incorporated herein by reference as if repeated herein in full.

3. As more fully set forth in said Complaint, petitioner was in collective bargaining relationship with Interscience Publishers, Inc. when the latter corporation consolidated on

October 2, 1961 with the defendant Company herein. After some negotiations the forty employees theretofore employed at Interscience were continued in the employ of the defendant, but thus far defendant has refused to honor the collective bargaining agreement and has refused to commit itself with respect to any continuing relationship between itself and the Union and or the former employees of Interscience.

[fol. 53] 4. Specifically, thus far the Company has refused:

- To accord the said employees the seniority rights which they had built up while employed by Interscience;
- To pay pension and health and welfare contributions to the District 65 Security and Pension Plan;
- To recognize its obligations with respect to job security, and grievance and arbitration procedures;
- To obligate itself to pay the severance pay vested in the former Interscience employees; and
- To accord to the employees their vested vacation rights.

The Company takes the position that notwithstanding the current collective bargaining agreement and Section 90 of the Stock Corporation Law and the general law, the consolidation between Interscience and the Company terminated the said collective bargaining agreement and all the property rights vested in the employees while employed at Interscience.

5. The Union takes the position that the collective bargaining agreement continues, and notwithstanding any alleged claim that the consolidation of the two corporations terminated the contract with the Union, the law is clear that the earned or vested rights of the employees continue even after the expiration of the contract. This was the holding of the United States Court of Appeals for the Second Circuit, in the case of *Zdanok v. Glidden Company*, 288 Fed. (2) 99

where the Court held, among other things, that seniority rights are earned or vested rights which survive the expiration of the contract.

In an article by Eugene A. Hoffman, Esq., Labor Relations Manager for the Minneapolis-Honeywell Regulator Co. of Minneapolis, Minnesota, presented to the Industrial Relations Committee, National Association of Manufacturers and published by the association, entitled "*Do the [fol. 54] Seniority Rights of Employees Survive an Expired Contract?*", it is stated: (In discussing *Zdanok v. Glidden*)

"Presumably, if one accepts the idea that seniority becomes a vested right, there is no reason to prevent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right."

6. As found by the *Glidden* case, the plaintiff Union, therefore respectfully submits that (a) in addition to the seniority rights of which the company wrongfully seeks to deprive its employees, the Company is in violation of its employees' rights in (b) failing to pay security and pension plan contributions to the 65 Plans and (c) in failing to accord to the employees, job security and grievance and arbitration proceedings as specified in the collective bargaining agreement and in failing to obligate itself with respect to (d) severance pay and (e) vacation pay. Hence this action is being brought by the Union to compel arbitration by the Company, on the issues specifically set forth in the complaint herein, as follows:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

[fol. 55] (d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

7. An Order to Show Cause is requested of the Court for the reason that the arbitration clause of the contract between the parties, provides in part as follows:

Sec. 16.3. Article XVI: Grievances: Adjustments of Disputes: Arbitration

"It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision."

No prior application has been made for this or similar relief.

8. Your petitioner has had several conferences with Paskus, Gordon and Hyman, Esqs., the Law firm representing Interscience and the defendant.

Wherefore, your petitioner respectfully prays that an order be made herein requiring John Wiley & Sons, Inc., to proceed to arbitration on the issues herein set forth.

David Livingston, as President of District 65,
R.W.D.S.U., AFL-CIO.

(Verified on January 24, 1962.)

CLERK'S NOTE RE EXHIBIT "1" ANNEXED TO PETITION

COMPLAINT

(Set forth in full at pages 3-42, herein.)

[fol. 56]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF IRVING ROZEN, IN SUPPORT OF MOTION
—January 24, 1962.

State of New York,
County of New York, ss.:

Irving Rozen being duly sworn, deposes and says:

I am an attorney and counselor-at-law, and a member of the firm of Weisman, Allan, Spett & Sheinberg, attorneys for the plaintiff herein.

I asked Harold Faggen Associates, Inc., union pension fund actuaries, to analyze the pension rights of the employees of Interscience Publishers, Inc., under the Wiley Plan (the plan of defendant Company), and under the 65 Plan (the plan of plaintiff Union), and I attach hereto and make part of this affidavit a chart showing such comparison.

This chart shows, in the main, that the employees' annual pension, under the 65 Plan, is greatly superior to that under the Wiley Plan; and therefore, the discontinuance of pension payments by defendant into the 65 Plan has damaged the plaintiff.

Irving Rozen.

(Sworn to January 24, 1962.)

[fol. 57]

CHART ANNEXED TO FOREGOING AFFIDAVIT

SCHEDULE OF PROJECTED ANNUAL PENSIONS

UNDER

EMPLOYEE'S RETIREMENT PLAN OF JOHN WILEY & SONS, INC.

AND

THE 65 SECURITY PLAN PENSION FUND

(At Age 65)

<i>Name of Employee</i>	<i>Pension Under Wiley Plan</i>	<i>65 Plan</i>
Hazel Sinclair	777	1,200
Anna Lion	73	-0-
Margit Porias	2,291	1,980
Ann Evans	1,303	1,800
Margarita Toro	1,496	1,980
Louis Druker	-0-	-0-
Anna Goldstein	475	960
Adelaide Prenner	-0-	600
Sophie Druker	-0-	-0-
Clodeaner Smalls	1,203	1,860
Esther Weinstein	-0-	660
Esther Gilbert	1,296	1,980
Esther Rothberg	71	660
Janet Murray	-0-	-0-
Hoyt Peters	1,130	1,920
Sadie Brown	761	1,560
Herbert Hart	1,198	2,280

[fol. 58]

<i>Name of Employee</i>	<i>Pension Under Wiley Plan</i>	<i>65 Plan</i>
Bernice MacFarlane	1,021	1,800
Loretta Baer	1,442	2,700
Inez Oliveri	1,373	2,520
D. Lem Calabro	1,353	2,400
Evelyn Shinohara	146	1,140
Europa MacIntosh	686	1,560
Florence deSola	1,018	2,100
Jimmie Brown	1,172	2,280
Bessie Mecucci	-0-	900
Hazel Levson	1,277	2,340
Vernon Brown	331	1,320
Irene Stein	1,280	2,340
Carmen Garcia	879	1,860
Helen Parham	1,186	2,040

OEIU 153, AFL-CIO

[fol. 59]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

62 Civ. 378

Weisman, Allan, Spett & Sheinberg, Esqs., Attorneys for Plaintiff; Irving Rozen, Esq., Of Counsel; 1501 Broadway, New York 36, New York.

Paskus, Gordon & Hyman, Esqs., Attorneys for Defendant; Charles H. Lieb, Esq., Robert H. Bloom, Esq., Of Counsel; 733 Third Avenue, New York 17, New York.

OPINION—March 29, 1962

SUGARMAN, D. J.

On February 1, 1960 Interscience Publishers, Inc., a New York corporation (herein Interscience or Employer), entered into a contract with District 65, Retail, Wholesale & Department Store Union, AFL-CIO (herein the Union), wherein Interscience recognized the Union as exclusive bargaining agent of the clerical and shipping employees of Interscience. The contract was for a term ending January 31, 1962 and provided for its automatic renewal unless notification by either party 60 days before an expiration date that changes in the agreement were desired.

On April 8, 1960 Interscience and the Union amended the contract to provide that the collective bargaining unit would not be reduced by lay-off below 26 employees. On [fol. 60] March 6, 1961 Interscience and the Union amended the contract with respect to the check-off provisions thereof.

Article XVI of the agreement of February 1, 1960 deals with "Grievances: Adjustment of Disputes: Arbitration". Section 16.0 provides that differences, grievances or disputes between Interscience and the Union arising out of or relating to the agreement, its interpretation, application or enforcement "shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dis-

pute". Section 16.0 then sets up three steps as to the "procedures".

The first step provides that when the grievance first arises it "shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department". If the grievance is not satisfactorily settled within two working days after the conference, it is to be reduced to writing and "signed by the Employer representative and the affected employee".

The second step provides that within five working days after its reduction to writing the grievance should be the subject of a conference between an officer of the Employer or its representative and the Union Shop Committee or its representative.

The third step provides that in the event that the grievance is not resolved in step two it "shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union".

Section 16.1 provides for the method of selecting an impartial arbitrator if the parties fail to agree upon an arbitrator pursuant to step three of Section 16.0. The remaining sections of Article XVI deal with how the parties shall conduct themselves while the arbitration is pending.

On August 11, 1961 Interscience entered into an agreement with John Wiley & Sons, Inc. which resulted in the [fol. 61] consolidation on October 2, 1961 of John Wiley & Sons, Inc. and Interscience into the defendant consolidated corporation John Wiley & Sons, Inc. (herein Wiley and the Company). No one contends that the consolidation was intended to enable Interscience to run away from its agreement with the Union or that the consolidation of Interscience and John Wiley & Sons, Inc. into Wiley was for anything other than bona fide business reasons.

Both before and after the consolidation on October 2, 1961, the Union contended that Wiley was bound to recognize it as the exclusive bargaining agent of the clerical and shipping employees of Interscience who had been merged into the Wiley organization. Upon the continued refusal of Wiley to accede to the demands of the Union,

the latter filed a complaint in this court on January 23, 1962, demanding judgment "directing that the defendant [Wiley] be compelled to submit to arbitration on the questions herein referred to, and directing said defendant to proceed with said arbitration to final award, together with costs and disbursements of this action". The complaint predicates jurisdiction of the cause upon "Section 301 of the Labor-Management Relations Act, * * * 29 U. S. C. Sec. 185 and the United States Arbitration Act, Title 9, U. S. C."

The Union by order to show cause returnable January 30, 1962 and adjourned to and argued on March 6, 1962, seeks an order directing Wiley to "submit to arbitration with the said Union on the following issues:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

[fol. 62] (c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract;

and directing said Company to proceed with arbitration to final award; and why the Union should not have such other and further and different relief as to this Court may seem just and proper in the premises. * * *

The Union *inter alia* argues that Section 90 of the Stock Corporation Law of the State of New York binds Wiley to

observe the contract of February 1, 1960 between Inter-science and the Union notwithstanding the consolidation. The pertinent portion of Section 90 provides that:

"such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations".

Wiley *inter alia* argues that the contract between Inter-science and the Union came to an end upon the consolidation on October 2, 1961 and that it is not bound to recognize or deal with the Union as the bargaining agent for the employees formerly represented by the Union and absorbed into the Wiley organization.

Assuming that the Union's contention that its agreement with Inter-science survived the consolidation and that Wiley [fol. 63] is bound to observe its terms, it must nevertheless fail on this motion. Section 16.6 of the agreement provides that:

"Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance."

It is undisputed that no notice of any grievance was so filed within four weeks after its occurrence nor were any of the procedures set up in Article XVI of the contract followed herein.

Arbitration is a contract obligation and we must look within the four corners of the contract which it is asserted makes a dispute arbitrable. The entire structure of Article XVI of the contract of February 1, 1960 in my view contemplates arbitration of a grievance between an "affected employee" represented by the Union, and the Employer. The contract does not indicate that arbitration was within the contemplation of the parties under the facts at hand, i.e., a consolidation of the Employer with a third party and its effect upon the rights of the individual employees within

the collective bargaining group and upon the Union as their exclusive bargaining agent.

It is fair to conclude that it was the intention of the parties to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it, because Section 16.5 of the contract between Interscience and the Union specifically excludes from arbitration such matters as:

- "(1) the amendment or modification of the terms and provisions of this agreement;
- (2) salary or minimum wage rates as set forth herein; [fol. 64]
- (3) matters not covered by this agreement; and
- (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement."

But even if it be said that each individual employee thus affected had a grievance for which the Union under the contract was designated as his negotiating agent, the procedures set up by the contract for the resolution of those individual grievances were completely ignored and constituted "an abandonment of the grievance".

While negotiations were had for some time prior to June 27, 1961 between the business agent of the Union and the attorney for Interscience, after the public announcement in late May or early June 1961 of the proposed consolidation of Interscience and John Wiley & Sons, Inc., into Wiley, and counsel for the Union as early as June 27, 1961 advised Interscience by letter that "any impairment of the rights of the employees will be resisted to the fullest possible extent under the law", the Union failed to avail itself of the procedures under the contract which were a condition precedent to arbitration. It had the entire period from late May, when first public announcement was made of the proposed consolidation, at least until August 11, 1961 when Interscience and John Wiley & Sons, Inc. agreed to consolidate into Wiley, and possibly until October 2, 1961 when the certificate of consolidation of Wiley was actually filed in

the Secretary of State's office, to initiate individual grievance machinery under the contract.

Had it done so it probably would have resolved prior to the actual consolidation the issues which it now seeks to resolve by arbitration because the agreement of August 11, 1961 between Interscience and John Wiley & Sons, Inc. to consolidate into Wiley provides in Paragraph VIII thereof as follows:

[fol. 65] "Anything herein or elsewhere to the contrary notwithstanding this agreement may be terminated and abandoned prior to the effective date of consolidation if:

(a) In the judgment of the board of directors of either of the corporations, any material litigation shall be pending or threatened against or affecting either of the corporations, or any of their respective assets, or the merger and consolidation, which renders it inadvisable to proceed with the merger and consolidation; * * *

Whether the contract of February 1, 1960 contemplated that the "Grievances: Adjustments of Disputes: Arbitration" procedures of Article XVI applied to the situation herein presented, or was intended to cover any grievances between individual employees and Interscience or both, the failure of the Union to avail itself of the procedures delineated in the contract constituted an abandonment of the grievance, individual or collective, pursuant to Sections 16.0 and 16.6 of the agreement.

Accordingly, the Union's motion that Wiley be compelled to submit to arbitration with it on the aforesaid issues is denied.

It is so ordered; no further order is necessary.

Sidney Sugarman, United States District Judge.

Dated: New York, New York, March 29, 1962

[fol. 66]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF CHARLES H. LIEB, IN OPPOSITION
TO MOTION—February 21, 1962

State of New York,
County of New York,
Southern District of New York, ss.:

Charles H. Lieb, being duly sworn, deposes and says:

I am an Attorney-at-law, admitted to practice in this Court, and am a member of the law firm of Paskus, Gordon & Hyman, Attorneys for the Respondent John Wiley & Sons, Inc. ("Wiley"). I make this affidavit in opposition to the Petition of District 65, Wholesale and Retail Department Store Union AFL-CIO (the "Union"), to require Wiley to submit certain questions to arbitration.

Prior to its merger into Wiley, my firm represented Interscience Publishers, Inc. ("Interscience"). Since the merger, we have represented Wiley.

In late May or early June, 1961, there was a public announcement of the proposed merger of Interscience into Wiley. Some time thereafter and prior to June 27, 1961, Mr. Turbane, the Business Agent of the Union, told me that the Union employees in Interscience were concerned that they might lose their jobs as a result of the proposed merger. I told Mr. Turbane that the merger would not be consummated prior to October and I assured him that I would give him advance notice of the actual date.

[fol. 67] Thereafter, I received a letter dated June 27, 1961 from Irving Rozen, a member of the law firm which represents the Union (Respdt.'s Exh. "3"), as follows:

"Dear Mr. Lieb:

District 65 has consulted us with respect to how the proposed 'joining forces' with House of John Wiley & Sons, Inc. by Interscience Publishers Inc. would affect the rights of their employees, members of Dis-

trict 65, and without limitation, their right to continued employment. While we do not have all the facts with respect to the 'joinder' of forces, according to their own announcement 'the publication and the distribution of our (Interscience) books' is to continue. We have come to the opinion that, under the agreement between the parties, our employees are entitled to continue working notwithstanding such joinder, and we call upon you to advise your client to see to it that the employees are not terminated from employment. Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law."

I did not answer the letter but in mid-September, 1961, I called Mr. Rozen and arranged to meet with him and with Mr. Turbane on Tuesday, September 19th. We met, as arranged. I told them that the merger would become effective two weeks hence, on Monday morning, October 2nd. I said that Wiley was a much larger Company than Interscience, that it did a much larger business, and had a much larger staff. I said that although the physical transfer from the Interscience to the Wiley premises would not be made until later in the year, it was Wiley's position that on October 2, when the merger became effective, the collective bargaining unit theretofore existing at Interscience would disappear and be merged into and be absorbed by the larger Wiley [fol. 68] unit which was not represented by the Union, or for that matter, by any other union.

They expressed the view that the Union should continue to represent the Interscience employees after the merger and until the expiration of the contract on January 31, 1962. I denied this and said that under no circumstances would Wiley recognize the Union as the bargaining agent for any of its employees unless so ordered by the National Labor Relations Board, and I offered our cooperation if the Union should decide to petition for an election.

Specifically, I made the following points:

1. that the 40 Interscience employees then represented by the Union would on October 2, 1961 become Wiley em-

ployees and members of a larger bargaining unit not represented by the Union;

2. that from and after October 2, 1961 Wiley would regard the Interscience contract with the Union as ineffective and would not recognize the Union as the bargaining agent for the former Interscience employees;

3. that from and after October 2, 1961 Wiley would make no further contributions to the District 65 Security Plan and the District 65 Security Plan Pension Fund except to make final settlement of the liability of Interscience for the calendar quarter ended September 30, 1961. Further, that when final payment was made, credit would be taken for the deposit which Interscience had made with the Security Plan and which, under the contract, was to be returned to Interscience on the termination of the contract; and

4. that all Interscience employees who became Wiley employees as a result of the merger would become eligible for qualification under the Wiley Employees Retirement Plan. In this connection I explained to them that the qualifications for entry into the Plan were the attainment of age 25 and three years of service with Wiley, and that the Plan [fol. 69] would be amended to provide that service with Interscience would be considered the same as service with Wiley.

I said that some jobs might be lost as a result of the combination of operations; that in my opinion the contract made no provision for severance payments under such circumstances, but that the Company would voluntarily make such payments in the amounts determined by the contract formula provided it received general releases from the employees in question.

Mr. Turbane and Mr. Rozen expressed the hope that no jobs would be lost, and said that they would inform the Union officers and the Interscience Union employees of Wiley's position and of its offer to make voluntary severance payments to those for whom no jobs might be available. I am advised that a shop meeting was called either that evening (September 19th) or on the following day, and

that a full disclosure was made by Mr. Turbane of the substance of our conversation as related above.

On September 21, 1961, at Mr. Rozen's request, I read Respondent's Exhibit "5" to him over the telephone, and on the following day it was delivered to all Interscience employees.

I had another meeting on September 26, 1961 with Mr. Turbane and with Mr. Cleveland Robinson, Secretary of the Union. At that meeting, Mr. Robinson and Mr. Turbane suggested an increase in the formula for the severance payments, to be made to those whose jobs might be lost as a result of the merger. They also suggested that payments determined in the same manner be made to employees who might resign their employment with Wiley within a period of 30 days following their transfer from the Interscience premises to the Wiley premises. I tentatively agreed to each of these proposals and they said that they would have another meeting with the shop.

On September 28, 1961, Mr. Robinson called me on the telephone. He said that he had met with the shop and with [fol. 70] other Union officers. He expressed no objection to Wiley's announced intention to consider the contract ineffective and to refuse to recognize the Union as the bargaining agent for the former Interscience employees on and after October 2, 1961. He said that the proposed severance payments were also agreeable. He requested, however, that the Interscience Union employees who entered Wiley employment should do so with their seniority rights vested in them.

I replied that seniority is a relative matter; that it defines the status of one employee in relation to other employees; that it would not be possible to afford seniority to the 40 Interscience employees then represented by the Union without establishing seniority for the other 40 Interscience employees and 300 Wiley employees; that Wiley had no seniority policy and did not plan to establish one; and that the proposal was unworkable, and, in any event, entirely unacceptable. I added that if the request was not withdrawn, Wiley would not consider itself bound by its offer to make severance payments.

Mr. Robinson was insistent. So was I. I said that there was no room for further conversation unless the Union withdrew its request. He said that the Union had instructed its lawyer to look into the matter. That was the end of the conversation, and the last conversation with Union representatives prior to the merger.

Four additional meetings were had with the Union after the merger. They took place between November 6, 1961 and January 4, 1962, and were without prejudice to Wiley's refusal to recognize the Union as the bargaining agent for any of its employees and its refusal to recognize the contract as effective on and after October 2, 1961. At the last of these meetings, I said that Wiley had found that it would not be necessary to terminate any jobs as a result of the combination of operations.

Charles H. Lieb

(Sworn to on February 21st, 1962.)

[fol. 71]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF AL TURBANE, IN SUPPORT OF MOTION—
March 5, 1962

State of New York,
County of New York, ss.:

Al Turbane, being duly sworn, deposes and says:

1. I am an Organizer employed by District 65, RWDSU, AFL-CIO, the plaintiff herein, and I have had charge of its labor relations with Interscience Publishers, Inc. for the past five years.

2. I participated in the meetings with Messrs. Lieb and Lobdell, referred to in their affidavits sworn to on February 21, 1962, and those at which the employees considered the situation with their employer-Company, John Wiley & Sons, Inc.

3. The fact is that throughout the six or more meetings which were held with representatives of the defendant Company, we, at all times, insisted upon recognition of the Union contract and that the rights of the employees be fully protected as they had accrued and become vested under the Union contract. This was made clear by the very first letter that our counsel addressed to the defendant's counsel (Respondent's Exhibit "3"), wherein, among other things, we stated

" * * * Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law."

[fol. 72] 4. Although the letter referred to above was mailed out on June 27, 1961, the Company did not deign to reply in any manner whatsoever until mid-September of 1961 when Mr. Lieb arranged for the conference of September 19. At that meeting, again our counsel and I informed Mr. Lieb that the Union took the position that the Union should continue to represent the employees even after the merger, and that the rights of the employees continue unaffected by the merger. Indeed, this is conceded by Mr. Lieb when he says, at page 3 of his affidavit of February 21, 1962, that

"They [myself and my counsel] expressed the view that the Union should continue to represent the Inter-science employees after the merger and until the expiration of the contract on January 31, 1962."

Our counsel called Mr. Lieb's attention to the recent decisions which had sustained the rights of employees notwithstanding removal of the plant or termination of the contract. We discussed seniority rights and severance pay as well, and Mr. Lieb made a certain offer. At that meeting we attempted to ascertain the names of the employees whom the defendant would not continue under employment, but Mr. Lieb refused to make such a disclosure.

5. I was present also at the meeting which took place between Mr. Lieb and Mr. Robinson on September 26, 1961,

where we restated our position on Union recognition and the continuation of the contract. We asked for coverage of the Interscience employees only, with the same rights they had had theretofore. Mr. Lieb refused to grant such requests and we probed the possibility of a settlement with severance pay for those who would not be continued in Wiley's employ. At that meeting Mr. Lieb told us that he thought that about 25% of the employees would not be continued.

6. I was present in Mr. Robinson's office during part of the time that he talked on the telephone to Mr. Lieb on Sep- [fol. 73] tember 28, 1961. I heard him restate our position as to Union recognition and representation by the Union of the Interscience employees, including the right of the employees to have the grievance machinery set forth in the contract. While he did not specifically state during that talk that

"I object to Wiley's announced intention to consider the contract ineffective."

(as set forth in substance at page 6 of Mr. Lieb's affidavit), he certainly did, by every utterance and every argument indicate that he strongly objected to Wiley's position that the contract was ineffective.

In settlement negotiations he did probe for severance pay and other bases upon which a compromise could be effectuated, but he never retreated from his position that Interscience and Wiley were wholly in the wrong—morally and legally—in attempting to cut off the contract and to cut off the employees' rights thereunder. Indeed, at this stage of the settlement negotiations it would have been most ill-advised on the part of Mr. Robinson, a seasoned Union negotiator, to have taken any other view; and this is the view that he maintained—that I maintain—and that our counsel (and later on, Mr. Livingston) maintained throughout the negotiations.

Mr. Cleveland Robinson is Secretary-Treasurer of the Union; he is the third highest man in the echelon of union officerships; and he was well able to negotiate and certainly

did not, nor could he ever have surrendered the Union's position and rights in the matter.

The best evidence of Mr. Robinson's views are, as a matter of fact, contained in Mr. Lieb's affidavit where he states—that which is a fact—that Mr. Robinson in that telephone conversation of September 28, 1961 insisted on seniority rights to Interscience employees (again, page 6 of Mr. Lieb's affidavit). Mr. Robinson was "insistent" (page 6 as above), even at the risk of upsetting all the negotiations for [fol. 74] a settlement. Mr. Lieb then stated that he was going to Europe and would not return for some time, but that at such time we could resume discussions for a compromise of the situation.

7. Additional four meetings were had between Mr. Lieb, Mr. Lobdell, Mr. Robinson, myself, and my counsel, and two of these were also attended by Mr. David Livingston, the President of the Union. At all of these meetings Mr. Livingston specifically insisted upon the continuation of the contract, upon seniority rights and grievance machinery, and upon the other rights of the employees. As a result of these conferences the Company finally yielded to the extent that it agreed to continue all the employees in their jobs—but as is set forth in the Company's affidavits, it specifically stated through Mr. Lieb at these meetings—that it would never recognize the Union or the contract or any of the rights of the employees thereunder. As a matter of fact, time and again, Mr. Lieb would state that any communication that he was having or holding with the Union or any of its representatives was not to be deemed in any wise a recognition of Union rights or authority.

This is not the case of one Company taking over another Company without knowledge of the latter company's union contracts. Mr. Lobdell, at page 3 of his affidavit, concedes that "Wiley was aware of Interscience's contract with the Union." Of course, the fact that Wiley acted on advice, which the Union disagrees with, can in no wise be deemed to prejudice the rights of its employees (cf. page 3, Lobdell's affidavit).

8. I want to make it absolutely clear, contrary to the impression sought to be given throughout the Company's

affidavits, that the employees were not, and are not satisfied with the disposition of their problems as effectuated by the Company. For example (passing over for the moment, the impropriety of the Company in obtaining information as to [fol. 75] what took place at a Union meeting), the fact is that at the October 4, 1961 meeting, the employees were very unhappy with the Company's attitude and proposals. I was present and chaired the meeting and I communicated the Company's proposals to the employees. Considerable discussion resulted on the part of the membership. At that time we were trying to work out a settlement with the Company and we wanted to get authority from the employees to continue with our negotiations and the employees did vote to authorize us to continue such negotiations. But there was no definite acceptance of a definite or firm offer. Indeed there could not have been, because, only a few days prior—September 28th—without intervening meetings or conversation between the Company and the Union, Mr. Robinson had been insistent upon getting certain points, which the Company was equally insistent upon not giving (page 6 of Mr. Lieb's affidavit). Moreover, the fact is too, that we held at least four additional meetings with the Company after this particular Union meeting, and at these four additional meetings the Union, as collective bargaining representative of the employees, made it amply clear to the Company that the proposals of the Company were wholly unsatisfactory.

Mr. Lobdell is leaning on a very weak reed indeed when he states that the Company's proposal

“ . . . was obviously satisfactory to the Union because on October 9, one week after the merger, Wiley made a final Union Security Plan payment which was accepted by the Union in full settlement of Interscience's obligation under the contract.” (page 4 of Mr. Lobdell's affidavit)

A glance at the Company's Exhibit 10A and B, will show that no such conclusion is possible; that the payment to the Union Security Plan was “final payment from July 1, 1961 to September 31, 1961.” There was nothing in the trans-

[fol. 76] mittal letter or the check which in any wise indicated that it was in "full settlement"!

9. Mr. Lobdell's affidavit seeks to give the impression that "employees had voluntarily resigned" and that each of the continuing employees is "satisfied with his job and the terms of his employment."

The facts are quite the opposite. There were no "voluntary resignations." The employees of Inter-science went over to Wiley with the hope of continuing their employment. They had invested many years of their lives in Inter-science's employ and had obtained many vested property rights. They were hopeful that these rights could be maintained and protected to them, and that Wiley would prove a good salvage of the situation that had developed. Each of the eleven employees who resigned did so because the jobs were not of the same character, responsibility or physical working conditions. The employees are not people of financial means and their property rights in their jobs are, of course, of the greatest importance to them and to their families. When the eleven resigned they did so because they just could not continue to work under the adverse conditions imposed upon them at Wiley . . . conditions that were inferior in many respects. One of the chief differences was that of status and importance. Here the work for the most part was routine, did not offer the same challenge or intellectual response enjoyed while at Inter-science, and the employees were made to feel menial. Some of the employees tendered their resignations because they could no longer see a career ahead of them such as had been open to them at Inter-science. They were given no opportunity to demonstrate their intellectual attainments in some instances and in other instances menial tasks were assigned to them markedly below their accustomed status and position in the Company. Such belittling of ability in the work relationship could only result in one thing—and that is that the employee must quit!

[fol. 77] In other instances the physical conditions surrounding the work were actually improper and here I refer to the poor lighting, improper heating of the room, etc., which made it quite impossible from the employees' stand-

point. As the employees had no grievance machinery or other representation for presenting their views to management, they had no alternative therefore but to resign.

The employees have raised the issues with the and with the Union as to seniority, job security, grievance procedures, severance pay, vacation pay; and pension, medical, disability and health insurance payments. They are most concerned about these matters and it is because of these issues that the Union has not been able to settle the controversy with the Company. If it be true that the employees themselves have not raised these issues with the Company, then it is because they are aware of the Union's current difficulties with the Company and the Company's reactions thereto. If the employees have not raised these issues with the Company it is because they are fearful that on so doing it would affect their standing in their jobs with the Company. Unprotected as the employees are by any Union, their fear is understandable. This in itself demonstrates beyond the possibility of a doubt, the need for a Union and the need for grievance machinery and the value of a collective bargaining agreement. The employees are not satisfied with their jobs or the terms of their employment, but under the economic realities of existence in society they have no alternative but to make the best of things. The attempts of these employees to salvage whatever they can out of a difficult situation should be recognized—in no wise should they be deemed approval or acquiescence in the Company's position or procedures.

10. It is an uncontradicted fact, and it must remain uncontradicted, that there was no acceptance either informally or formally by either the employees or the Union of the Company's proposals or of its position or of its procedures. The negotiations throughout were, as Mr. Lieb himself put it,

[fol. 78] " . . . without prejudice to Wiley's refusal to recognize the Union as the bargaining agent for any of its employees and its refusal to recognize the contract as effective on and after October 2, 1961." (at page 7 of Mr. Lieb's affidavit)

These very statements in Mr. Lieb's affidavit show beyond doubt that throughout the Union was insisting on recognition and the continuation of the contract, but that the Company was adamantly opposed and insisted that any discussions be without prejudice to its position.

Any action that Wiley took was entirely unilateral. If Wiley for example, incurred an obligation of funding the past services of Interscience's employees for pension benefits and did this "in part on reliance upon the acceptance of the employees", it did so unilaterally and can point to no document or statement which justified its "reliance".

As a matter of fact this is the first time that I have heard about this funding cost and I am sure none of the employees has any knowledge whatsoever on this subject. Obviously, the defendant's counsel, if he had any real "reliance", it would have been reduced to some writing or document.

This "reliance" demonstrates the utter invalidity of the defendant's entire case.

11. While no formal demand for arbitration was made by the Union, from the very first letter written by our counsel on June 27, 1961, down to the very last conference held on or about January 4, 1962, we consistently made it clear to the Company that we would do everything within our power to protect the employees' rights. We specifically told the Company and its representative time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract. It comes with exceedingly ill grace on the part of the Company [fol. 79] to take the position of alleged lack of compliance by the Union with the grievance machinery of the contract. We had at least six meetings; engaged in a great deal of correspondence, and held several telephone conversations—all dealing with this subject, and the Company of course, was fully aware of the issues involved. At no time did the Company ask for or seek any other grievance procedures. Now, it is wholly improper for it to raise this question of alleged technical noncompliance by the Union. And as a matter of fact, it was the Company which initiated the grievance procedures followed in this case because it was

Mr. Lieb, who in mid-September of 1961 called our counsel on the telephone and arranged for the first conference of September 19th (page 2 of Mr. Lieb's affidavit).

Mr. Lobdell is Vice-President and Treasurer of defendant and he was present at at least two of the conferences with our Union President, Mr. Livingston, and he was made fully aware of the issues and problems. Hence, if there be any impropriety in the Union procedures, it must be held that the Company had waived them and consented to a substitution of the procedures that were followed. The Company is now estopped from insisting on the alleged conditions precedent to the contract. It is also true that the grievance machinery was never intended to take care of a situation of this nature where a whole Company itself is affected and where every job in the Company is involved. A reading of the grievance machinery clauses will show that they were intended only to apply to the small grievance affecting a single employee.

12. The affidavits of Messrs. Lobdell and Lieb show on their face that from the very first meeting on September 19, 1961, it would have been utterly useless and futile for the Union to have attempted to comply with any grievance machinery clauses. Messrs. Lobdell and Lieb tell us time and again through their affidavits referred to hereinabove, that [fol. 80] the Company would never under any circumstances yield to the Union on these issues. Mr. Lieb—in his conversations—told us that throughout their meetings, while the Company might give a little more in severance pay or might take an extra employee into the Wiley company, the defendant *never never "in a million years"* would agree to any disposition which would continue the rights of the employees or would it recognize the Union or the contract.

Thus, it seems that the Company tells us in one breath—through the authorized affidavits—that at no time since October 2, 1961, has it recognized the Union; and in almost the very same breath the Company complains that the Union is not carrying on as it should. This is inconsistent and shows that there is no validity to the Company's entire position.

We feel there is no reason why the Wiley company cannot recognize the Union inasmuch as it has no Union of its

own which might take an adverse position (see page 8 of Mr. Lobdell's affidavit).

13. Inasmuch as certain stipulations entered into between the parties may have some bearing upon the plaintiff's motion, I attach hereto and make a part of this affidavit, copies of such stipulations which are dated, January 26, 1962 and February 8, 1962 respectively. These stipulations of adjournment were entered into at the request of the defendant.

Al Turbane

(Sworn to before me this 5th day of March, 1962.)

[fol. 81]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNDERTAKING FOR COSTS—April 17, 1962

Whereas, an order was entered in the above entitled action on the 29th of March, 1962 in the District Court of the United States for the Southern District of New York; and

Whereas, the Appellant, David Livingston as President of District #65, Retail, Wholesale & Department Store Union, AFL-CIO, feeling aggrieved thereby has prosecuted his appeal to the United States Circuit Court of Appeals for the Second Circuit.

Now, Therefore, United States Fidelity and Guaranty Company, having an office and usual place of business at No. 100 Maiden Lane, City of New York, County and State of New York, hereby undertakes in the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, that if the judgment or order so appealed from is affirmed or the appeal is dismissed, the Appellant, David Livingston, as President, etc., shall pay all costs awarded against him on said appeal, or such costs as the Appellate Court may award if the judgment or order be modified, the total liability of the surety

under this undertaking shall not exceed Two Hundred Fifty & 00/100 (\$250.00) Dollars.

Dated, New York, April 17, 1962

United States Fidelity and Guaranty Company, By
Clifford B. Ellin, Attorney-in-fact.

[fol. 82]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
62 Civ. 378

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO, Plaintiff;

against

JOHN WILEY & SONS, INC., Defendant.

NOTICE OF APPEAL—Filed April 18, 1962

Sirs:

Notice is hereby given that David Livingston, as President of District 65, RWDSU, AFL-CIO, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the order of Honorable Sidney Sugarman, United States District Judge, entered in this proceeding on March 29, 1962 and contained in the Court's Opinion on said date, which order denies the plaintiff's motion to compel the defendant to submit to arbitration; and plaintiff hereby appeals from each and every part of said order.

Dated: New York, New York, April 18, 1962

Weisman, Allan, Spett & Sheinberg, Attorneys for
Plaintiff, 1501 Broadway, New York 36, New York.

To:

Paskus, Gordon & Hyman, Esqs., Attorneys for Defendant, 733 Third Avenue, New York 17, New York.

[fol. 83]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of DAVID LIVINGSTON as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO, Plaintiff-Appellant,

—against—

JOHN WILEY & SONS, Inc., Defendant-Appellee.

Appendix to Brief for Defendant-Appellee—
Filed September 28, 1962

Paskus, Gordon & Hyman, Attorneys for Defendant,
Appellee, 733 Third Avenue, New York 17, New
York; Charles H. Lieb, Robert H. Bloom, Of
Counsel.

[fol. 85]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Index No. 378/1962

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO, Plaintiff,

—against—

JOHN WILEY & SONS, INC., Defendant.

AFFIDAVIT OF FRANCIS LOBDELL, IN OPPOSITION TO MOTION—
February 21, 1962

State of New York,
County of New York,
Southern District of New York, ss.:

Francis Lobdell, being duly sworn, deposes and says:

I am Vice President and Treasurer of John Wiley & Sons, Inc. ("Wiley") a New York corporation, which has its principal office and place of business at 440 Park Avenue South, New York, New York. I submit this affidavit in opposition to the Petition herein.

Service of the Petition and order to show cause was accepted by Wiley's counsel on January 25, 1962. Service of the complaint which is incorporated by reference in the Petition was made on Wiley on January 29, 1962. The time to answer or otherwise move with respect to the complaint has been extended by stipulation of the parties until a final order is entered in these proceedings.

[fol. 86] The Petition is brought to compel Wiley to proceed to arbitration with the Petitioner (the "Union") under the arbitration clause (Article XVI) of a collective bargaining agreement, Petitioner's Exh. "1," (the "contract") made by the Union with Interscience Publishers, Inc. ("Interscience"). The contract was made in 1960 and by its

terms expired on January 31, 1962. Interscience was a New York corporation, having its office at 250 Fifth Avenue, New York, New York, and on October 2, 1961 was merged into Wiley.

The issues on which arbitration is sought are stated as follows:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract; and

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

[fol. 87] The Petition assumes that the Court has jurisdiction under the United States Arbitration Act, Title 9, U. S. C. I am advised by counsel that the Court lacks jurisdiction under that Act and, therefore, that the Petition should be dismissed.

Apart from the jurisdictional question, however, the Petition is without merit and should be summarily denied.

Wiley has no contract with the Union requiring it to submit to arbitration or to recognize any other obligation in favor of the Union, nor has it ever entered into or established any collective bargaining relation with the Union. When Wiley agreed to merge Interscience into Wiley, it was aware of Interscience's contract with the Union. It was advised and believed that at the time of

merger, the collective bargaining unit of 40 persons represented by the Union would be absorbed into the larger Wiley unit of about 380, which was not and is not represented by any Union; that the Union would then become *functus officio* and the contract ineffective, and that if the Union had a contrary view, its remedy would be to apply to the National Labor Relations Board for clarification and relief.

Steps were taken with great care to give the Union advance notice of the merger date and of the Company's view of the effect that the merger would have on the contract. As appears from the chronological summary which follows, the Union knew in June, 1961 that the Companies would merge. Two weeks before the merger was actually accomplished the Union was put on notice that on and after the merger date, Wiley would not recognize the Union or consider itself bound by the contract. On September 28, the Thursday before the merger, a registered letter was sent to [fol. 88] the Union reaffirming that fact. On the following Monday, October 2, another letter to the Union confirmed that the merger had taken place and that Wiley would not recognize the Union or give any effect to the contract it had made with Interscience. This was satisfactory to the employees, for (I have been told) two days later, on October 4, there was a meeting at which by an overwhelming vote of those present, the change in status was approved. And it was obviously satisfactory to the Union because on October 9, one week after the merger, Wiley made a final Union Security Plan payment which was accepted by the Union in full settlement of Interscience's obligation under the contract.

It should be noted, too, that the Union has never made the slightest pretense at compliance with the contract procedures for arbitration.

With great detail the contract outlines "the sole means of obtaining adjustment" (Article XVI).

"Step 1" requires a conference between "the affected employee" and representatives of the Union and the Company. If the grievance is not settled in two days, it is to be reduced to writing and signed by the Employer and "the affected employee."

"Step 2" requires a further conference between the Union and Company within 5 days after the preparation of the written statement prescribed in Step 1.

If the grievance has not been resolved, "Step 3" requires its submission to arbitration before an arbitrator chosen by mutual consent. The submission to arbitration must occur within two weeks of the "inception" of the grievance, unless the time is extended in writing. If the parties fail to agree upon an arbitrator, he shall be selected by the [fol. 89] filing of "a demand for arbitration by the aggrieved party" with the American Arbitration Association.

A grievance must be filed "with the Employer and the Union Shop Steward" within four weeks after its occurrence or latest existence, and a failure to file the grievance "within this time limitation" shall be deemed "an abandonment of the grievance." Under the most generous interpretation of the time limits established by the contract, the "grievance" should have been filed not later than four weeks after the merger, or October 30, and the demand to choose a mutually agreeable arbitrator should have been made within two weeks thereafter. None of these steps has been taken and any "grievance" that may have arisen as a result of the merger has, by mandate of the contract, been "abandoned".

There were 40 Interscience employees represented by the Union. Eleven have voluntarily resigned, delivering general releases to the Company at the time. The remaining twenty-nine continue in Wiley's employ. No one has been discharged or laid-off. No one has been disciplined or has asserted a grievance. No one has raised any issue with respect to seniority, job security, grievance procedures, severance pay, vacation pay, or pension, medical, disability or health insurance payments, as those terms were used in the contract. To the best of my knowledge, each of them is satisfied with his job and his terms of employment.

The following is a summary of the relevant facts:

1. The contract in suit, made in 1960 and expiring on January 31, 1962, is the last of a series of collective bargaining contracts made by Interscience with the Union or its predecessor. Separate contracts were made in 1949, 1951,

1953, 1954, 1956, 1958 and in 1960. The 1953, 1954, 1956, [fol. 90] 1958 and the 1960 contracts follow the same general pattern and are basically different from the earlier contracts. A copy of the 1951 contract is marked Respondent's Exh. "1"* for comparison with the 1960 contract.

2. October 2, 1961. Interscience was merged into Wiley, with Wiley continuing as the surviving Company. Copies of the merger agreement and Certificate of Consolidation are marked Respondent's Exhs. "2A" and "2B." Each was engaged in business as a publisher of scientific books.

Interscience was organized in 1940, it occupied about 5,500 square feet of space at 250 Fifth Avenue, and had approximately 80 employees, 40 of whom were clerical and shipping employees represented by the Union.

Wiley was organized in 1904, succeeding to a business originally established in New York in 1807. It occupies more than five floors at 440 and 432 Park Avenue South, having in all approximately 44,000 square feet. It also leases 70,000 square feet of warehouse space in the Starrett Lehigh Building on West 26th Street in New York City, and is building an office and warehouse in Salt Lake City, Utah, which will have approximately 20,000 square feet.

Just prior to the merger, Wiley had about 300 employees, none of whom was represented by a union. Wiley employees have never been represented by a union and there is no established Wiley policy with respect to "seniority rights," "job security," "grievance procedures" or "severance pay," as those terms are used in the Petition.

3. May and June, 1961. As appears from the annexed affidavit of Mr. Lieb verified February 21, 1962, the Union [fol. 91] and the Interscience employees whom it represented had ample prior notice of the merger. On July 27, 1961, Mr. Rozen, Union counsel, addressed Respondent's Exh. "3" to Mr. Lieb, insisting that the Interscience employees be continued in their jobs notwithstanding the merger. I am advised that on the same day, members of the Union Shop Committee met with Mr. Mosbacher, an Inter-

* This and all other Respondent's Exhibits are incorporated herein by reference and will be submitted herewith.

science Vice President, and expressed uneasiness over the pending merger. They were told that Mr. Turbane, who was then and is now the Union's business agent, should feel free to fully discuss the matter with Mr. Lieb.

4. September 19, 1961. Mr. Lieb had the meeting with Mr. Turbane and Mr. Rozen which is described in his affidavit. At that meeting, he told them that the merger would become effective at the opening of business on October 2, 1961, and that at that time Wiley would regard the Interscience contract with the Union as ineffective and would not recognize the Union as the bargaining agent for the former Interscience employees.

5. September 21, 1961. Interscience wrote to its employees that the merger with Wiley would become effective on Monday, October 2, 1961, and that on that day they would become Wiley employees. A copy of that letter is marked Respondent's Exh. "5."

6. September 29, 1961. Mr. Lieb had a second meeting with the Union representatives, as described in his affidavit.

7. September 28, 1961. Interscience sent a registered letter to the Union repeating that the collective bargaining agreement would not be recognized on and after October [fol. 92] 2, 1961 except for the obligation to pay to the "65 Security Plan" the amount due for the quarter ended September 30, 1961. That letter, marked Respondent's Exh. "6," follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. with Wiley remaining as the surviving corporation becomes effective on October 2, 1961 at 9:00 a.m. At that time our employees become Wiley employees and our collective bargaining agreement with you will no longer be effective except for the obligation to pay to the '65 Security Plan' the amount due for the quarter ended September 30, 1961. In due course the report for that period and the supplemental W-2 forms will be sent to you with payment

for the difference between the amount shown to be due and the deposit which you are now holding for Interscience's account."

8. October 2, 1961, the effective date of the merger Wiley delivered two letters to the former Interscience employees. Respondent's Exh. "7" is a letter of welcome addressed to all. It follows:

"Dear Fellow Employee:

Welcome to John Wiley & Sons, Inc. I am glad that you have joined us, to put together two good companies into a new organization which I am confident will be recognized as the strongest and best in its field. As a Wiley employee you will share on an equal footing with all other Wiley employees in the various benefits which the company supplies. The attached summary, and the supplemental material will acquaint you with these benefits. Read the material carefully and if not entirely clear on [fol. 93] every point be sure to ask your supervisor for further explanation.

Your attention is specifically invited to our Employees Retirement Plan. Please note that three years of service and age twenty five are required for membership. The pension trust has been amended so that your service with Interscience will be deemed to be service with Wiley.

Wiley has been a publisher continuously since 1807. It could not have grown and prospered as it has except through the services of satisfied and happy employees. This is now your company and I am confident that you will also be satisfied and happy here."

The other, Respondent's Exh. "8," was delivered only to those former Interscience employees who had been represented by the Union. It follows:

"Dear Fellow Employee:

Until today, as an employee of Interscience Publishers, Inc. you were represented for collective bar-

gaining purposes by District 65. By virtue of the merger between Interscience Publishers, Inc. and John Wiley & Sons, Inc. which took place today, Interscience has disappeared as a legal entity and Wiley remains as the surviving corporation. You are now a Wiley employee doing similar work as part of a larger group which is not represented by District 65. Effect therefore will not be given to the collective bargaining contract which existed between Interscience and District 65."

On the same day, Wiley sent a registered letter to the Union, Respondent's Exh. "9," as follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. became effective at 9:00 a.m. [fol. 94] today. You were recognized by Interscience Publishers, Inc. as the collective bargaining agent for its clerical and shipping employees. These employees are now Wiley employees and are a minority accretion to an identical unit of Wiley employees for which you are not the chosen collective bargaining agent.

For your information we enclose a copy of a letter which has this day been delivered to the former employees of Interscience Publishers, Inc., whom you represented before the merger."

The copy of the letter enclosed therewith was Wiley's letter to the former Union employees, Respondent's Exh. "8," above quoted.

No reply has ever been received to any of the above-mentioned letters.

9. October 4, 1961. I have been advised that on this day a meeting took place of the Interscience employees formerly represented by the Union. At that meeting, the vote was 20 to 2 in favor of accepting the change in status effected by the merger and to accept the Company offer of severance pay for those who would lose their jobs as

a result of the combination of Interscience and Wiley operations.

10. October 9, 1961. The Company made the final Union Security Plan payment due from it under Section 15.1 of the contract. In its letter of October 9, 1961, marked Respondent's Exh. "10," the Company wrote:

"Gentlemen:

We are enclosing our check in the amount of \$684.06 in payment of the following:

[fol. 95]

- | | |
|--|------------|
| 1. Amount due to the "65 Security Plan" for the quarter ended September 30, 1961 | \$4,184.06 |
| 2. Less: Deposit which you are now holding for Interscience's account | 3,500.00 |
| Check enclosed | \$ 684.06 |

The supplemental W-2 forms will be sent to you shortly."

The check enclosed therewith was endorsed "• • • Final Payment from July 1, 1961 to September 31, 1961," and was deposited by the 65 Security Plan on October 13, 1961 (Respondent's Exhs. "10A," "10B").

11. Miscellaneous. Wiley's Board of Directors on October 2, 1961 adopted resolutions amending the Wiley Employees Retirement Plan to include the former employees of Interscience and to give them credit for their past service with Interscience. Copies of these resolutions are marked Respondent's Exh. "11."

On November 3, 1961, a certified copy of the resolutions was forwarded to the Internal Revenue Service, Pension Trust Group, New York City, in order that the Plan, as amended, would remain qualified under the applicable provisions of the Internal Revenue Code. A copy of the forwarding letter is marked Respondent's Exh. "12," and a copy of the reply from the Internal Revenue Service, advising of the approval of the changes is marked Respondent's Exh. "13."

The cost to Wiley of funding the past service of all Interscience employees who entered Wiley's employ is \$62,370. Wiley incurred this obligation at least in part in reliance upon the acceptance by the employees formerly [fol. 96] represented by the Union of the benefits offered them under the Wiley Retirement Plan in place of the benefits formerly accruing under the District 65 Security Plan and Pension Fund.

A letter of November 24, 1961 was received from the Union addressed to Interscience, stating the Union's desire to make certain changes in its contract (Exh. "14" attached hereto). I believe that this is a form letter sent as a matter of routine to all companies with whom the Union has a collective bargaining agreement. On December 4, 1961 a reply was sent by Company counsel, calling the Union's attention to the fact that Interscience had been merged with Wiley, and that personnel formerly in the employ of Interscience were now Wiley employees and, therefore, that the Union's letter was moot (Respondent's Exh. "15").

Another form letter, dated December 1, 1961, was received from the Union addressed to Interscience (Exh. "16" attached hereto), and to this letter Company counsel likewise replied in the same vein (Respondent's Exh. "17" attached hereto).

12. At no time since October 2, 1961, the effective date of the merger, has Wiley recognized the Union as the collective bargaining agent for any of the Company's employees, and at no time has it recognized any rights or privileges which the Union or the members of the former Shop Committee, or the former Shop Steward, had enjoyed under the Union contract with Interscience.

[fol. 97] 13. No demand was made by the Union for arbitration prior to the service of the moving papers in this proceeding.

The Petition should be dismissed.

Francis Lobdell

(Sworn to on the 21st day of February, 1962.)

[fol. 98]

EXHIBIT 14 TO AFFIDAVIT**Letterhead of****District 65 Retail, Wholesale and Department Store Union
A.F.L.-C.I.O.****November 24, 1961****REGISTERED RETURN
RECEIPT REQUESTED****Interscience Publishers, Inc.
250-5th Ave.
New York, N. Y.****Gentlemen:**

In accordance with the provisions of our agreement, we are hereby notifying you of our desire to make certain changes in our contract.

Please inform us as to a convenient date to arrange a discussion for this purpose.

Very truly yours,**CLEVELAND ROBINSON
Secretary-Treasurer**

[fol. 99]

EXHIBIT 15 TO AFFIDAVIT**Letterhead of****Paskus, Gordon & Hyman****December 4, 1961****District 65
Retail, Wholesale and Department Store Union
13 Astor Place
New York 3, N. Y.****Gentlemen:**

We refer to your registered letter of November 24, 1961, addressed to Interscience Publishers, Inc. at 250

Fifth Avenue, New York City, in which you state that "In accordance with the provisions of our agreement, we are hereby notifying you of our desire to make certain changes in our contract". You have previously been advised that Interscience Publishers, Inc. has been merged into John Wiley & Sons, Inc. and that personnel formerly in the employ of Interscience Publishers, Inc. are now Wiley employees. Your letter therefore, under the circumstances, appears to be moot.

Very truly yours,

CHARLES H. LIEB

CHL:hc

[fol. 100]

EXHIBIT 16 TO AFFIDAVIT

Letterhead of

District 65 Retail, Wholesale and Department Store Union
A.F.L.-C.I.O.

December 1, 1961

Interscience Pub. Inc.
250 Fifth Avenue
New York City

Gentlemen:

The collective bargaining agreement in effect between us expires on February 1, 1962.

Over the past number of years, we have had a number of unfortunate situations resulting from failure to complete negotiations for a new contract by the expiration date. On the one hand, our members have failed to secure the prompt benefits of new terms and conditions, and on the other, employers have been subjected to protracted periods of unrest and tension.

The General Council of our Union, therefore, has adopted a policy to the effect that all work will cease in every shop

where a contract has not been renewed, effective as of the date of expiration.

We are confident that you will agree with us that it is to our mutual advantage to immediately begin negotiations [fol. 101] so that difficulties can be avoided. We, therefore, urge you to make arrangements to meet with appropriate committees of your employees and designated union representatives, to begin negotiations immediately..

Very truly yours,

CLEVELAND ROBINSON
Cleveland Robinson
Secretary-Treasurer

CR/b

[fol. 102]

EXHIBIT 17 TO AFFIDAVIT

Letterhead of

Paskus, Gordon & Hyman

December 5, 1961

District 65
Retail, Wholesale and Department Store Union
13 Astor Place
New York 3, N. Y.

Gentlemen:

We have your letter of December 1, 1961 addressed to Interscience Publishers, Inc. It appears to have been written under the same misapprehension that was evident in your earlier letter of November 24, 1961 to Interscience Publishers, Inc., and our reply thereto of December 4 covers the situation.

Very truly yours,

CHARLES H. LIER

CHL:hc

[fol. 103]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO, Plaintiff,

—against—

JOHN WILEY & SONS, INC., Defendant.

AFFIDAVIT OF CHARLES H. LIEB, IN OPPOSITION TO MOTION—
March 6, 1962.

State of New York,
County of New York,
Southern District of New York, ss.:

Charles H. Lieb, being duly sworn, deposes and says:

I request permission to submit this affidavit in connection with certain statements made by Al Turbane in his affidavit sworn to March 5, 1962, which was served on my office late yesterday afternoon and which has just come to my attention.

Most of the statements in the affidavit are argumentative. A few, however, require comment.

1. Mr. Turbane says that the Wiley employees who formerly were represented by the Union "were not and are not satisfied". (p. 5, p. 7). To the best of my knowledge, no such dissatisfaction has been indicated to any of their superiors in the Wiley organization and it is significant [fol. 104] that Mr. Turbane does not state the names of the employees who feel aggrieved.

2. On page 7, Mr. Turbane refers to the eleven employees who have resigned their jobs with Wiley. He implies that these eleven employees have grievances to be processed. He neglects to say that at the time of resignation, each of the employees executed and delivered a

general release in favor of Interscience and Wiley receiving in exchange therefor a substantial terminal payment voluntarily made by the Company.

3. On page 9 of his affidavit, Mr. Turbane makes the statement that the action taken by Wiley in bringing the former Interscience employees into the Wiley Employees' Retirement Plan "was entirely unilateral". He overlooks that in Interscience's letters of September 21 and September 28, 1961 (Respondent's Exhs. 5, 6) and in Wiley's letters of October 2, 1961 (Respondent's Exhs. 7, 8, 9), it was clearly stated that the employees entering Wiley's employment as a result of the merger would be covered under the Wiley plan (with credit for past service) and not under the Union's plan. The actual cost to Wiley of funding past service with Interscience for the employees formerly represented by the Union was, I am informed, \$18,462.00.

Charles H. Lieb

(Sworn to on the 6th day of March, 1962.)

[fol. 105]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 101—October Term, 1962

Argued November 5, 1962

Docket No. 27629

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale and Department Store Union,
AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

Before: MEDINA, SMITH and KAUFMAN, Circuit Judges.

Appeal from an order of the United States District
Court for the Southern District of New York, Sidney
Sugarman, Judge.

District 65, Retail, Wholesale and Department Store
Union, AFL-CIO appeals from an order denying its motion
to compel arbitration pursuant to the terms of a collective
bargaining agreement. Opinion below reported at 203 F.
Supp. 171. Reversed.

Irving Rozen, New York, N. Y. (Myron Nadler and
Weisman, Allan, Spett & Sheinberg, New York,
N. Y., on the brief) for plaintiff-appellant.

[fol. 106] Charles H. Lieb, New York, N. Y. (Robert
H. Bloom and Paskus, Gordon & Hyman, New
York, N. Y., on the brief), for defendant-appellee.

OPINION—January 11, 1963

MEDINA, Circuit Judge:

District 65, Retail, Wholesale and Department Store
Union, AFL-CIO appeals from an order of the District

89

Court for the Southern District of New York denying its motion to compel arbitration under a collective bargaining agreement. The opinion below is reported at 203 F. Supp. 171.

Beginning in 1949 the Union entered into collective bargaining agreements with Interscience Publishers, Inc., the last one dated February 1, 1960, for a term of two years ending January 31, 1962. None of these agreements was stated in terms to be binding on Interscience "and its successors." On October 2, 1961 Interscience effected a consolidation for bona fide business reasons with another publishing firm, John Wiley & Sons, Inc. A dispute arose with respect to the effect of the consolidation on the status of the collective bargaining contract and the Union. Interscience before the consolidation, and Wiley thereafter took the position that the agreement was automatically terminated for all purposes by the consolidation, and that all rights of the Union and the employees arising out of the agreement were at an end. The Union adhered throughout the discussions and correspondence both before and after the consolidation to the view that the agreement was not terminated by the consolidation and that certain rights had become "vested" which Wiley must recognize. The details of this controversy will be more fully described shortly. The upshot was that the Union demanded arbitration [fol. 107] of the dispute, under Article XVI of the Agreement (set forth in full in the Appendix to this opinion), relating to "Grievances: Adjustment of Disputes: Arbitration," and on January 23, 1962, the Union commenced this action against Wiley to compel arbitration. The District Court assumed that the agreement survived the consolidation, but denied arbitration on two grounds: that the agreement should be so construed as "to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it"; and that, even if not so limited, the Union has failed to avail itself of the grievance procedure described in the agreement and had thus abandoned any rights it might have had to arbitration of the dispute.

We think it clear that the District Court had jurisdiction of the case under Section 301 of the Labor Management

Relations Act, 29 U. S. C. Section 185, and that the appeal by the Union is properly before us. *Textile Workers Union v. Lincoln Mills*, 1957, 353 U. S. 448; *General Electric Co. v. Local 205, United Electrical Workers*, 1957, 353 U. S. 547; *Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, 1957, 353 U. S. 550. We also hold, as matter of federal law, (1) that the agreement and rights arising therefrom were not necessarily terminated by the consolidation, and that Wiley and the Union are proper parties to the arbitration proceeding; (2) that the terms of the agreement contemplated the arbitration of just such a dispute or controversy as the one before us and that the attempt to arbitrate here is not an improper effort to secure status as collective bargaining agent for the negotiation of a new contract, nor is it an attempt to secure allegedly proscribed "quasi-legislative" arbitration; (3) that issues raised by Wiley arising out of the Union's alleged failure to comply with certain requirements of the agreement relative to so-called grievance procedure are matters to be decided by the arbitrator.

[fol. 108] The facts, sketched above, may be stated more fully as follows:

On October 2, 1961 Interscience employed 80 persons, of whom 40 were covered by the 1960 contract; Wiley employed 300 persons. Interscience, with a single plant in New York City, did an annual business of \$1,000,000; Wiley, an older company, had three substantially larger plants, and did an annual business of \$9,000,000.

The Union learned of the proposed consolidation in June of 1961 and on June 27 wrote Interscience, stating its position that the contract would remain in force notwithstanding the consolidation. On September 19, 1961 Interscience initiated conversations with the Union, in the course of which Interscience insisted that the contract would end upon consolidation. On September 21, 1961 Interscience wrote its employees, stating its views on termination, and offering jobs at the Wiley plant in New York City. On October 2, 1961, the effective date of the consolidation, Wiley wrote the Union stating that the contract was terminated.

All of Interscience's 80 employees were subsequently employed by Wiley, but 11 later resigned and received severance pay voluntarily granted by Wiley. The Union does not allege discrimination against these persons, but attributes their resignation to worsened working conditions. Wiley has placed the Interscience employees under its own pension plan, crediting them for past service with Interscience, but it does not recognize their seniority or other rights under the Interscience contract, nor does it recognize the appellant Union or any other union.

The Interscience contract obliged Interscience to make quarterly payments into an employee pension fund. The Union contends that Interscience's payment for the third quarter of 1961 was inadequate, and that Wiley is obliged and has failed to make up this deficit and also to make the [Vol. 109] payment due for the fourth quarter. The total claim amounts to \$8,000. The contract also contains provisions according to the Interscience employees rights regarding seniority, job security, grievance procedure, and vacation and severance pay.

On January 23, 1962 the Union commenced this action in the District Court to compel Wiley to arbitrate the dispute between the parties concerning the effect of the consolidation upon the contract and the so-called "vested" rights of the Union and the employees to continued payments by Wiley to the Interscience employee pension fund and to seniority, job security, grievance procedure, and vacation and severance pay, "now and after January 30, 1962."

I

The question of "substantive arbitrability" is for the court not for the arbitrator to decide. *Atkinson v. Sinclair Refining Co.*, 1962, 370 U. S. 238, 241. The controlling law is not New York law but federal law. *Textile Workers Union v. Lincoln Mills*, *supra* at 456. The sources of that law, to be fashioned by judicial inventiveness, are the express provisions of the national labor laws, the basic policies underlying these laws, "state law, if compatible with the purpose of Section 301" and which "will best effectuate the federal policy," and accepted principles of

traditional contract law. *Id.* at 457; *Local 174, Teamsters Union v. Lucas Flour Co.*, 1962, 369 U. S. 95, 105. See Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N. Y. U. L. Rev. 448 (May, 1962); Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of The Law under Section 301*, 28 Univ. Chi. L. Rev. 707 (1961).

[fol. 110] The Union tells us that under Section 90 of the New York Stock Corporation Law¹ the contract did not automatically terminate because the provisions of this statute are to the effect that the consolidated corporation is "deemed to have assumed" and "shall be liable" for "all liabilities and obligations" of the constituent corporation just as if it "had itself incurred such liabilities or obligations." But this legislation is clearly not binding upon us, and we may or may not find that the rule thus formulated, with or without qualifications or in some modified form, "will best effectuate the federal policy." We have found no case formulating a rule of federal law on the point at issue here, and none has been called to our attention. We must accordingly, to the best of our competence, and giving due weight to the legislation of the Congress

¹ *Rights of creditors of consolidated corporations.*

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.

in the area of labor-management relations and other sources relevant to the task, including the provisions of Section 90 of the New York Stock Corporation Law, fashion for the first time the rule of federal law that is to govern the decision of the first and preliminary question presented [fol. 111] for our consideration: Did the consolidation abruptly terminate the collective bargaining agreement and the rights of the Union and the employees created or arising thereunder?

We think it clear and we decide and hold that the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements (*Textile Workers Union v. Lincoln Mills*, *supra* at 453-4; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 1960, 363 U. S. 574, 578; *Local 174, Teamsters Union v. Lucas Flour Co.*, *supra* at 105; *Drake Bakeries Inc. v. Local 30*, 1962, 370 U. S. 254, 263) can be fostered and sustained only by answering this question in the negative. And we reach this conclusion despite the fact that the agreement contains no statement that its terms are to be binding upon Inter-science "and its successors", and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled. Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation.

A further principle, particularly applicable in the formulation of new segments of federal labor law, is, we think, the principle of restraint that requires us to formulate the rule that is decisive of the case before us, and to go no further.

Thus, while we do hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement,² we do not decide what those rights are.

² As this action was commenced prior to January 31, 1962, the termination date of the agreement, our decision is entirely con-

[fol. 112] As will appear in a later portion of this opinion, the power and function of making a decision, or a series of decisions, with respect to these rights, have been reserved by the parties for the arbitrator in the course of the arbitration proceedings that will follow our reversal of the order appealed from. Cf. *Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, 1 Cir., 1956, 233 F. 2d 104, 110, affirmed, 1957, 353 U. S. 550. Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract.

Several additional objections to arbitration have been made on the ground of improper parties. Wiley contends that it cannot be made a party to the arbitration proceeding because it was not a party to the agreement and the arbitration clause was not binding upon it. We think that our discussion above disposes of this objection as well. When negotiating and before effectuating the consolidation of October 2, 1961, Wiley was aware of the existence of the collective bargaining agreement and of its obligations under the New York Stock Corporation Law Section 90. In view of the national policy of promoting industrial peace and stability and the special function of arbitration in promoting these ends, above adverted to, we think and hold, in the exercise of our duty to fashion an appropriate [fol. 113] rule of federal labor law, that it is not too much to expect and require that this employer proceed to arbi-

sistent with *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 2 Cir., filed December 10, 1962, where we held that grievances arising after the expiration of a collective bargaining agreement are not arbitrable.

tration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation.³

³ The National Labor Relations Board has specifically recognized that the rule (see *N. L. R. B. v. Aluminum Tabular Corp.*, 2 Cir., 1962, 299 F. 2d 595, 598) that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise, does not control the issue, presented in the instant case, of the binding character, and meaning of contractual rights under a preexisting agreement. *Cruse Motors, Inc.*, 1953, 105 N. L. R. B. 242, 248. This is because of the inapplicability of the rationale of the rule, which is that certification "is an official pronouncement by the Board that a majority of the employees in a given work unit desire that a particular organization represent them in their dealings with their employer," and that where there has been a substantial change in the nature of the employment enterprise "there may well be a consequent change in the nature of the work required of the employees resulting in differences in their working condition problems. Thus the employees may feel that they can be better served by another employee organization." *N. L. R. B. v. Armato*, 7 Cir., 1952, 199 F. 2d 801, 803. See also *N. L. R. B. v. Lunder Shoe Corp.*, 1 Cir., 1954, 211 F. 2d 284, 286.

Similarly inapplicable are cases holding that an existing agreement will not bar a Representation petition under Section 9(c) of the Labor Management Relations Act when there has been a substantial change in the nature of the employment enterprise. The rationale of these cases, inapplicable here, is that "sound and stable labor relations will best be served by allowing the employees in the reconstituted units to determine for themselves the labor organization which they now desire to represent them." *L. B. Spear & Co.*, 1953, 106 N. L. R. B. 687, 689. Cases involving enforcement of previously obtained orders of the National Labor Relations Board against a successor employer, which may or may not be favorable to Wiley's position (see Annot., 46 A. L. R. 2d 592, 1956), are also without significant effect here because of the specific limitations imposed in those cases by Rule 65(d) of the Federal Rules of Civil Procedure (*Regal Knitwear Co. v. N. L. R. B.*, 1945, 324 U. S. 9, 13-14) and the public policy that one should "not be adjudged [guilty] of wrongdoing . . . without complaint, notice, full opportunity to present [one's] . . . defenses and the other essential requirements of due process of law." *N. L. R. B. v. Birdsall Stockdale Motor Co.*, 10 Cir., 1953, 208 F. 2d 234, 237.

(footnote continued)

[fol. 114] Wiley also argues that the Union is not the proper party to present the claims of these employees. But the fact that the contract has now terminated does not itself bar arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 1960, 363 U. S. 593. There is no showing that the Union here has been decertified. *Glendale Mfg. Co. v. Garment Workers, Local 520*, 4 Cir., 1960, 283 F. 2d 936, cert. denied, 1961, 366 U. S. 950; *Modine Mfg. Co. v. Machinists*, 6 Cir., 1954, 216 F. 2d 326. There is here no rival union, whose rights would be interfered with by the Union's pressing of these employee claims. *Kenin v. Warner Bros. Pictures, Inc.*, S. D. N. Y., 1960, 188 F. Supp. 690. In short, there is no showing that the freedom of choice of any employee would in any way be infringed by the Union's pressing of the employee claims under a preexisting agreement, and we are aware of no reason why the Union may not enforce arbitration of a dispute or controversy concerning rights alleged to have arisen out of and pursuant to the terms of the collective bargaining agreement which it negotiated, especially where there appears to be no other person or entity in a position legally to enforce arbitration.

II

The issues tendered by the Union for arbitration are:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

[fol. 115] (b) Whether, as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District

Livingston v. Gindoff Textile Corp., S. D. N. Y., 1961, 191 F. Supp. 135, cited by Wiley, is also without application since the original employer there underwent a complete dissolution, rather than a consolidation, and was found to have no legal or substantial factual relationship with the successor employer. Nor was such a showing made in *Office Employees International Union, Local 153, AFL-CIO v. Ward-Garcia Corp.*, S. D. N. Y. 1961, 190 F. Supp. 448.

65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

In its brief and on oral argument the Union characterized the rights claimed by it on behalf of itself and the employees it represents as "property rights" or "vested rights" built up by the employees "during their long years of employment" in accordance with the terms of the collective bargaining agreement.⁴ Hence the essence of the proposed

⁴ In *Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, *supra*, at 110, the First Circuit recognized that:

"Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the form of 'fringe benefits,' some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern."

The possibility of such "vested" rights has been recognized specifically with respect to vacation and severance pay [*In re Wil-Low Cafeterias*, 2 Cir., 1940, 111 F. 2d 429, 432; *Botany Mills, Inc. v. Textile Workers Union of America, AFL-CIO*, 50 N. J. Super. 18, 141 A. 2d 107 (1958); *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't., 1955), affirmed *sub nom. Potoker v. Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 161 N. Y. S. 2d 609, 147 N. E. 2d 841 (1957)]; seniority rights [*Zdanok v. Glidden*, 2 Cir., 1961, 288 F. 2d 99]; and pension plan rights [*New York City Omnibus Corp. v. Quill*, 189 Misc. 892, 894-6, 73 N. Y. S. 2d 289, 291-3 (Sup. Ct. 1947), modified on other grounds, 272 App. Div. 1015, 79 N. Y. S. 2d 925 (1st Dep't., 1947), affirmed, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy v. Valentine*, 268 N. Y. 228,

[fol. 116] submission is that the arbitrator determine the nature of and proper remedy for implementing those rights, if any, as to seniority, pension plan, job security, grievance procedure, and vacation and severance pay, which he finds accrued during the term of the collective bargaining agreement. In other words, implicit in the submission is the possibility that the arbitrator may decide that no rights to seniority, pension plan, job security, grievance procedure, or vacation and severance pay, survived the consolidation or the date of expiration of the collective bargaining agreement. It is not our function to express any opinion on the subject, provided the agreement contemplates that such a question or congeries of questions was to be decided by arbitration. *United Steelworkers of America v. American Mfg. Co.*, 1960, 363 U. S. 564, 567-9.*

197 N. E. 260 (1934)). Cases holding that no such rights in fact exist, such as *Oddie v. Ross Gear & Tool Co.*, 6 Cir., 1962, 305 F. 2d 143, 150, recognize that the matter is solely one of the "construction of the agreement." See Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Nw. U. L. Rev. 646, 651 (1959).

* We realize that there may be serious difficulties in giving to the Interscience employees special treatment in preference to the Wiley employees of long standing. Perhaps the arbitrator can work out some fair lump sum settlement which would avoid later friction. Be that as it may, the very fact that in the instant case we are presented with such difficult issues in a new and important field as yet largely unexplored, is ample reason why we must, as we do, leave the merits to the arbitrator whose creative role in the interpretation of collective bargaining agreements has been well remarked upon. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 578-81; Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-93 (1959).

Of course, if the arbitrator in deciding the merits should purport to establish and enforce rights accruing subsequent to the termination of the agreement, or if, although purporting to define and implement rights accruing under the contract although maturing thereafter, he should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award. The Supreme Court has clearly stated, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra* at 597:

[fol. 117] We may note that it is just because the Union seeks to arbitrate the existence and nature of rights which it claims "vested" during the term of the agreement, although maturing after the termination thereof, that arbitration here does not conflict with the rule above discussed, that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise. So too, it is because of this claim of "vested rights" that our order of arbitration does not conflict with decisions, whose validity we need not pass upon, barring "quasi-legislative" [fol. 118] arbitration. See *Boston Printing Pressman's Union v. Potter Press*, D. Mass., 1956, 141 F. Supp. 553, affirmed, 1 Cir., 1957, 241 F. 2d 787, cert. denied, 355 U.S. 817; *Couch v. Prescolite Mfg. Corp.*, W. D. Ark., 1961, 191 F. Supp. 737; *In re Valencia Baxt Express, Inc.*, D. P. R., 1961, 199 F. Supp. 103.

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance, in many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Appealing as it is, we cannot yield to the suggestion that we should now enunciate those standards which should guide the arbitrator in his determination of the existence, nature and remedy for implementing any employee rights accruing under and surviving the expiration of the collective bargaining agreement, so that he will know definitely whether any award he may make will "draw its essence from the collective bargaining agreement." To do this would be to intrude in a domain not ours and to invert the whole order of procedure in this delicate field of labor relations.

A careful scrutiny of the agreement discloses, we think, a perfectly clear intention that the questions propounded by the Union be arbitrated. A distinction is made, on the very face of the agreement, between ordinary grievances personal to individual employees, on the one hand, and other, perhaps more important disputes, such as the one before us, relative to "matters affecting the entire bargaining unit," both of which, however, are subjected to arbitration. Read as a whole the agreement clearly contemplates the arbitration of any "difference" or "dispute" between the Union and the employer "arising out of or relating to this agreement, or its interpretation or application, or enforcement." Arbitration is not limited to "grievances." This language, quoted from Section 16.0 of Article XVI, relating to "Grievances: Adjustments of Disputes: Arbitration," is plainly intended to be broad and comprehensive. And we must remember the teaching of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 584-5, that the dispute is to be arbitrated unless it is perfectly clear that it is specifically and plainly excluded. The party claiming exclusion has a heavy burden. See *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 2 Cir., 1962, 298 F. 2d 644.

The exclusion clause relied upon here is Section 16.5(3) referring to "matters not covered by this agreement." Wiley would have us hold that, because the agreement does not mention the possibility of consolidation, the "matter" in suit is not covered by the agreement. This is pure sophistry. This suit involves the Union's claim of rights [fol. 119] to pension plan, seniority, vacation and severance pay and other matters that are covered by specific provisions of the agreement, and even if such claim is wrong or even untenable and frivolous, this does not bar arbitration. *United Steelworkers of America v. American Mfg. Co.*, *supra* at 568-9. Moreover, the various specific references to matters reserved for the sole control of the employer and resting in his discretion, contained elsewhere in the agreement, merely emphasize the fact that no such specific exclusionary clauses make reference to any privilege on the part of the employer to consolidate with another com-

pany and cut off rights allegedly "vested" in the employees, such as the right to payments to the welfare fund, to vacations, and to seniority. It is not probable that the Union would have agreed to any such exclusionary-clause had the subject come up for discussion.

A further argument in support of the interpretation of the agreement given above is that as arbitration is described as "the sole and exclusive" remedy of the parties and the employees, "in lieu of any and all remedies, forums at law, in equity or otherwise," "for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement" (Section 16.9), it is not reasonable to suppose that it was intended that the Union should have no right whatever to resort to arbitration in the event of a consolidation, but should be entirely at the mercy of the employer.

III

While the Supreme Court has clearly held that the question of "substantive arbitrability" is for the court (*Atkinson v. Sinclair Refining Co.*, *supra* at 241), it has never expressly decided the question as to "procedural [fol. 120] arbitrability," namely, whether or not adherence or lack of adherence to the grievance and arbitration procedure outlined in a collective bargaining agreement is for decision by the court or by the arbitrator. Nor do we discern such a ruling by implication in the fact, adverted to by Wiley, that one week after deciding the *Steelworkers* cases the Court denied certiorari in *Brass & Copper Workers v. American Brass Co.*, 7 Cir., 1959, 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845, a case in which the Seventh Circuit had held that the question is for the court. So far as other authority is concerned, this Circuit has never spoken clearly on the issue, and there appears to be a difference of opinion on this point in the other Circuits, with more recent decisions holding that the question is for the arbitrator.* The

* *Boston Mutual Life Insurance Co. v. Insurance Agents International*, 1 Cir., 1958, 258 F. 2d 516 (court function); *Brass & Copper Workers v. American Brass Co.*, *supra* (court function);

lower federal courts seem also to be split,⁷ and the commentators in general agree that the matter is for the arbitrator.⁸

This question of "procedural arbitrability" is squarely before us now. By way of preliminary we must, we think, take note of the fact that "substantive arbitrability" and "procedural arbitrability" are separate and distinct matters. The Supreme Court has explained the rule that "substantive arbitrability" is for the court in the following terms:

"The Congress . . . has by § 301 of the Labor Management Relations Act, assigned the courts the

Radio Corp. of America v. Association of Professional Engineering Personnel, 3 Cir., 1961, 291 F. 2d 105 (arbitrator function); *International Association of Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238 (citing cases which hold that it is the arbitrator's function).

Arbitrator's function: *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, E. D. Pa., 1960, 187 F. Supp. 97; *Local 971, United Automobile Workers AFL-CIO v. Bendix-Westinghouse Automotive Brake Co.*, N. D. Ohio, 1960, 188 F. Supp. 842; *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, W. D. Pa., 1959, 188 F. Supp. 225, affirmed, 3 Cir., 1960, 283 F. 2d 93; *United Cement Workers International Union, AFL-CIO v. Allentown-Portland Cement Co.*, E. D. Pa., 1958, 163 F. Supp. 816; *Insurance Agents International Union, AFL v. Prudential Ins. Co.*, E. D. Pa., 1954, 122 F. Supp. 869 (purporting to apply state law).

Court function: *Truck Drivers v. Grosshans & Petersen*, D. Kan., 1962, 51 L. R. R. M. 2116; *General Tire & Rubber Co. v. Local 512, United Rubber Workers of America, AFL-CIO*, D. R. I., 1961, 191 F. Supp. 911, affirmed, 1 Cir., 1961, 294 F. 2d 957; *United Brick & Clay Workers v. Gladding, McBlain & Co.*, S. D. Calif., 1961, 192 F. Supp. 64; *Brass & Copper Workers Co. v. American Brass Co.*, E. D. Wis., 1959, 172 F. Supp. 465, affirmed, 7 Cir., 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845; *International Union of Operating Engineers v. Monsanto Chemical Co.*, W. D. Ark., 1958, 164 F. Supp. 406.

⁷ Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959); *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 Yale L. J. 611 (1961). Contra: 28 Univ. Chi. L. Rev., *supra* at 732.

duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to arbitrate."

United Steelworkers of America v. Warrior & Gulf Co., *supra* at 582; *Atkinson v. Sinclair Refining Co.*, *supra*, at 241. However, as Professor Cox has correctly noted in his article in 72 *Harvard Law Review*, *supra* at 1511, "the reason for giving the court power to decide what subject matter is within the arbitration clause does not extend" to the issue of "procedural arbitrability", for the court's duty to determine "whether the reluctant party has breached his promise to arbitrate" is exhausted once it has been determined that "the party seeking arbitration is making a claim which on its face is governed by the contract" or that "the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers* [fol. 122] *of America v. American Mfg. Co.*, *supra* at 568; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 582. See *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, E. D. Pa., 1960, 187 F. Supp. 97, 100.

Thus the settled law on the issue of "substantive arbitrability" does not control the decision of the separate problem now under discussion, and we think there is ample reason for holding that issues of compliance with grievance and arbitration procedure in the ordinary collective bargaining agreement are properly within the competence of the arbitrator. We find wholly unpersuasive the argument that questions of procedure in collective bargaining agreements involve "largely a matter of contract construction" as to which "the industrial context is irrelevant" and that consequently "the courts' expertise in construing agreements seems to qualify them as the appropriate forum for determining procedural compliance." 28 *Univ. Chi. L. Rev.*, *supra* at 732. Rather we believe that a holding that this Court or any court should decide the merits of a dispute concerning procedural questions under an arbi-

tration clause of a collective bargaining agreement would be quite inconsistent with the principles and policies enunciated by the Supreme Court to the effect that once it has been determined that the reluctant party has breached his promise to arbitrate, the matter must go to the arbitrator for determination on the merits. *United Steelworkers of America v. American Mfg. Co.*, *supra* at 568; *United Steelworkers of America v. Warrior & Gulf Co.*, *supra* at 581-2; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra* at 596.

What is fundamental to the teaching of these cases, as we read them, is the ruling that the parties have bargained for a decision by an arbitrator because they [fol. 123] thus have the benefit of his creativity and expertise that are in no small measure due to his knowledge of and familiarity with the industry and shop practices constituting the environment in which the terms of collective bargaining agreement were negotiated and assented to. Surely, and especially under the conditions of the industrial world of today, this environment, and the concrete day-by-day relationships to which the agreement must be applied, includes the implementation of the arbitration clause and its procedural aspects. See *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 Yale L. J. 611, 618 (1961); Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959). Cf. Fleming, *Problems of Procedural Regularity in Labor Arbitration*, 1961 Wash. U. L. Q. 221. Indeed, it may well be that the arbitrator can make his most important contribution to industrial peace by a fair, impartial and well-informed decision of these very procedural matters. To hold matters of procedure to be beyond the competence of the arbitrator to decide, would, we think, rob the parties of the advantages they have bargained for, that is to say, the determination of the issues between them by an arbitrator and not by a court. A contrary decision would emasculate the arbitration provisions of the contract.

The position just above outlined seems to us to be the only sound position to take, especially when we consider what are the particular procedural questions involved in

this case. Accordingly, we shall summarize, as briefly as we can, the miscellaneous contentions of Wiley that are supposed to fall in the category of procedure and the way these contentions are dealt with by the Union. Thus Wiley claims the Union was required to follow Steps 1, 2 and 3, described in Section 16.0. The Union replies that these [fol. 124] applied only to an "affected employee," and not to the controversy in this case which affects the entire bargaining unit. The Union also points to the fact that there was an orderly exchange of views, and says this surely was a substantial compliance with the contract. Cf. *International Association of Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238. With respect to Wiley's claim that there was a failure to comply with the requirement of Section 16.6 that "any grievance must be filed with the Employer and with the Union Shop Steward within four (4) days after its occurrence or latest existence," the Union replies that the question here is not a "grievance" but a "dispute" or "difference" arising out of the agreement and that this Section has no application to a dispute over such a broad question as to whether all the employees had "vested" rights under the contract inextinguishable by unilateral action by the employer; and that to say this is a "grievance" to be filed "with the Employer and with the Union Shop Steward" borders on absurdity. Moreover, the Union contends that, if some sort of notice of the dispute was required within four weeks after its "occurrence or latest existence," the letter of June 27, 1961, filed within four weeks after the Union learned of the proposed consolidation, was such notice. It is further argued by the Union that the dispute was plainly a continuing one. But the Union adds that even if all its contentions as above stated were to be rejected, there was a clear waiver of procedural requirements by Wiley.

Is it to be supposed that the benefits of arbitration, duly bargained for, are to be indefinitely postponed, just because one of the parties tenders a miscellany of such contentions as these, and argues that no arbitration can be had until after a court has rejected them and they have also been passed upon by this Court?

[fol. 125] It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 2 Cir., 1959, 271 F. 2d 402, 410, cert. granted, 1960, 362 U. S. 909, dismissed per stipulation, 364 U. S. 801. The numerous cases involving a great variety of procedural niceties already cited in the footnotes to this opinion make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all sorts of technical obstructionism. This would be completely at odds with the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters Union v. Lucas Flour Co.*, *supra* at 105. See *In the Matter of Jacobson*, D. Mass., 1958, 161 F. Supp. 222, 227 (opinion by Wyzanski, J.), reversed and remanded *sub nom.*, *Boston Mutual Life Ins. Co. v. Insurance Agents Union*, *supra*. Cf. *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, *supra* at 645.

It is for this reason that we cannot agree to the distinction propounded by Judge Palmieri in his very excellent discussion in *Carey v. General Electric Co.*, S. D. N. Y., 1962, 50 L. R. R. M. 2119, 45 CCH Lab. Cas. Par. 17,599, between matters of procedural compliance requiring the expertise of the arbitrator for decision and those which the courts are capable of deciding on their own. If the court must first decide whether a particular procedural problem calls for the special abilities and knowledge of an arbitrator, there will be inevitable delay. Such a practice, if followed, would develop a whole new body of decisional law, with the usual distinctions and refinements. Moreover, we have serious doubts that the suggested distinction between different types of procedural questions arising out of the arbitration clauses in collective bargaining agreements [fol. 126] can be placed upon any tenable and rational basis. In any event, it is clear that the practical consequences of attempts by the courts to apply such a distinction would be delay and prejudice to the speedy and effective arbitration which we believe the national policy calls for.

Having thus decided that the question of "procedural arbitrability" is for the arbitrator, we do not reach the merits of Wiley's contentions that the Union did not comply with the procedural requirements of the collective bargaining agreement.

Reversed with a direction to order arbitration.

APPENDIX

Article XVI: Grievances: Adjustments of Disputes: Arbitration.

Sec. 16.0. Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as "grievance":

Step 1: The grievance, when it first arises, shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department. The grievance shall be presented orally. If, at this step, the grievance is resolved to the mutual satisfaction of the parties, a memorandum stating the substance of the settlement shall be prepared and signed by the Employer representative and the affected employee. Copies of the same shall be furnished to the Union's Shop Steward and the Employer. In [fol. 127] the event that the grievance is not satisfactorily settled within two (2) working days after the conclusion of the conference stated above, the grievance shall be reduced to writing. It shall state the nature of the claim made and the objections raised thereto and shall be signed by the Employer representative and the affected employee.

Step 2: Within five (5) working days thereafter, the grievance shall be the subject of a conference between an officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union, at which conference the parties will endeavor to resolve and settle the grievance.

Step 3: In the event that the grievance shall not have been resolved or settled in "Step 2", the grievance shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union. All grievances not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by Employer and the Union.

Sec. 16.1. In the event that the parties fail to agree upon an impartial arbitrator, as provided in "Step 3", the impartial arbitrator, by the filing of a demand for arbitration by the aggrieved party, shall be selected and designated by the American Arbitration Association, pursuant to whose Rules for its Voluntary Labor Arbitration Tribunal, any and all arbitrators shall be conducted.

Sec. 16.2. The arbitrator finally designated to serve in that capacity, after receiving a written statement signed jointly by the Employer and the Union certifying to his selection and designation as aforesaid and containing a concise statement of the issue involved, shall conduct the arbitration in accordance with the Arbitration Law of the [fol. 128] State of New York. The decision of the Arbitrator shall be final and binding upon the parties. All expenses incidental to the arbitrator's services, if any, shall be borne equally by the Employer and the Union.

Sec. 16.3. It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision.

Sec. 16.4. It is expressly agreed that there shall be no strike, slow-downs or suspension of work of any nature while a grievance is in the process of negotiation and disposition under the grievance and arbitration procedures of this Article.

Sec. 16.5. It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

(1) the amendment or modification of the terms and provisions of this agreement;

(2) salary or minimum wage rates as set forth herein;

(3) matters not covered by this agreement; and

(4) any dispute arising out of any question pertaining to the renewal or extension of this agreement.

Sec. 16.6. The status in effect prior to the assertion of a grievance or the existence of any controversy or dispute shall be maintained pending a settlement or decision thereof. Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this [fol. 129] time limitation shall be construed and be deemed to be an abandonment of the grievance.

Sec. 16.7. Nothing contained in this Article shall be deemed to be a restriction or limitation of the rights of the Employer, or the Union, or an individual employee, or a group of employees, as specified in Section 9(a) of the Labor Management Relations Act, 1947, as amended. However, whenever any meetings or conferences are held with the Employer during business hours, the Union's employee-representatives shall be limited to only two (2) employees. During negotiations for the renewal of this agreement, the Union's negotiating committee shall be limited to no more than three (3) employees. Except in emergency situations, employees shall not discuss grievances with Stewards during regular working hours.

Sec. 16.8. Grievances or disputes arising out of this agreement shall not be combined or accumulated and submitted as a part of one case or arbitration proceeding. Accordingly, no arbitrator shall have the authority to hear or determine more than one (1) grievance, unless several grievances arise out of the same common state of facts, and are relevant and germane to one another. Whenever any provision in this agreement reserves to the Employer the right to exercise its sole discretion or judgment with

respect to specific subjects, events, matters or situations, the exercise or non-exercise of such discretion or judgment shall not be arbitrable.

Sec. 16.9. Except for threatened breaches or actual breaches of the provisions of Article "25" of this agreement ["Strikes and Lockouts"] the arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all [fol. 130] acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. The waiver of all other remedies and forums herein set forth shall apply to the parties hereto, and to all of the employees covered by this contract. No individual employee may initiate an arbitration proceeding.

KAUFMAN, Circuit Judge, concurring:

In view of the extraordinary complex problems raised in the case before us, all of which have been thoroughly and persuasively dealt with in the opinion of Judge Medina and so many of which will have broad ramifications in the growing and yet unshaped field of federal labor law, I deem it my responsibility to clarify what I interpret to be the holding of the court today. We hold that the collective bargaining agreement between Interscience and the Union does not clearly remove from the scope of arbitration the following questions: (1) Whether the collective bargaining agreement as a whole survived the consolidation of Interscience and Wiley; (2) If the agreement did survive the consolidation—thereby imposing upon Wiley an obligation to arbitrate at the behest of the Union disputes arising before its natural termination on January 31, 1962—whether the Union had to comport with the three-step grievance procedure, and if so, whether it did in fact comport with it or was relieved from doing so; and (3) Whether

certain Union and employee rights became "vested" under the terms of the agreement.

Although the collective bargaining agreement contains no express provision making its obligations binding upon [fol. 131] the successors of the parties, our decision today, in effect, permits the arbitrator to "imply" such a provision into the agreement if, under the circumstances present here such an implication is proper. In doing so, he will no doubt make an effort to extrapolate the probable intentions and expectations of the parties, to evaluate the change in the nature and scope of the employment unit and employer-employee relationships, the disruptive potential of implying such a clause, and other relevant factors. It is this power to read a successor clause into the collective agreement which makes Wiley a proper party defendant in the case before us. What we decide here is that since the arbitrator *may* find that the agreement was intended to bind successors, and that since Wiley is the successor of Inter-science, then Wiley is a potential party to a binding arbitration decree. Our mere refusal to determine that Wiley is not a proper party defendant in this judicial proceeding does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the obligation to arbitrate or the obligation to respect the allegedly "vested" rights of the employees. So too, the Union is a proper party plaintiff, even though the arbitrator may ultimately determine that, because the collective bargaining agreement was not intended to survive consolidation, the Union cannot compel arbitration.

With this interpretation of the court's holding in mind, I enthusiastically register my concurrence.

[fol. 132]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold Medina, Hon. J. Joseph Smith,
Hon. Irving R. Kaufman, Circuit Judges.

DAVID LIVINGSTON, as President of District 65,
R. W. D. S. U., AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

JUDGMENT—January 11, 1963

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of
record from the United States District Court for the
Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, ad-
judged, and decreed that the . . . of said District
Court be and it hereby is reversed with a direction to order
arbitration in accordance with the opinion of this court;
with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 133]

[File endorsement omitted]

[fol. 134]

Petition for rehearing and for rehearing in banc covering
28 pages filed January 25, 1963, omitted from this print.

It was denied and nothing more by orders dated Febru-
ary 5, 1963.

[fol. 157]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
February 5, 1963

Paskus, Gordon & Hyman, New York, N. Y., for defendant-appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 158] [File endorsement omitted]

[fol. 159]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
February 5, 1963

A petition for a rehearing in banc having been filed herein by counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 160] [File endorsement omitted]

[fol. 161]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. J. Joseph Smith,
Hon. Irving R. Kaufman, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 5, 1963

A petition for a rehearing having been filed herein by
counsel for the defendant-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 162]

[File endorsement omitted]

[fol. 163]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27629—Cal. No. 217

In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale and Department Store Union,
AFL-CIO, Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC., Defendant-Appellee.

APPLICATION TO STAY THE MANDATE PENDING CERTIORARI—

Filed February 15, 1963

The defendant-appellee moves the Court to enter an
order withholding the mandate in this case, pursuant to
Rule 28(c) of this Court, on the grounds that it is the

intention of the defendant-appellee to make proper and timely application to the Supreme Court of the United States for a writ of certiorari in this case. In support of this application, the defendant-appellee attaches hereto the affidavit of Charles H. Lieb, Esq., attorney for the defendant-appellee.

Notice of Motion

Please Take Notice that the undersigned will bring the above motion on for a hearing before this Court at the United States Courthouse, Foley Square, New York, New York, on the 11 day of February, 1963, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Paskus, Gordon & Hyman, By Charles H. Lieb, A member of the firm, Attorneys for Defendant-Appellee, 733 Third Avenue, New York 17, New York.

[fol. 163a] To:

Weisman, Alan Spett and Sheinberg, Esqs., Attorneys for Plaintiff-Appellant, 1501 Broadway, New York 36, New York.

[fol. 164]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AFFIDAVIT

State of New York,
County of New York, ss.:

Charles H. Lieb, having been duly sworn, deposes and says:

1. I am a member of the firm of Paskus, Gordon & Hyman, attorneys for the defendant-appellee herein, and I am familiar with all the proceedings had herein.

2. I hereby certify that it is the bona fide intention of the defendant-appellee to make proper application to the Supreme Court of the United States for a writ of certiorari in this case.

3. I believe that the judgment of this Court ought to be reversed by the United States Supreme Court.

4. This affidavit is made in support of the defendant-appellee's application to stay the mandate of this Court pending such application for certiorari, pursuant to Rule 28(c) of this Court.

Subscribed and sworn to this day of 1963.

Charles H. Lieb

[fol. 165] Motion granted subject to the provisions of Rule 28 of the Rules of this Court.

HRM, JJS, IRK, USCJJ.

February 15, 1963.

[File endorsement omitted]

[fol. 166]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Harold R. Medina, Hon. J. Joseph Smith,
Hon. Irving R. Kaufman, Circuit Judges.

[Title omitted]

ORDER GRANTING MOTION TO STAY ISSUANCE OF MANDATE
UNDER RULE 28(c)—February 15, 1963

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted in accordance with the provision of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk.

[fol. 167]

[File endorsement omitted]

[fol. 168] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 169]

SUPREME COURT OF THE UNITED STATES

No. 934—October Term, 1962

JOHN WILEY & SONS, INC., Petitioner,

vs.

DAVID LIVINGSTON, ETC.

ORDER ALLOWING CERTIORARI—Filed May 13, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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MAR 15 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

DOCKET No. ~~10000~~ **91**

JOHN WILEY & SONS, INC.,

Petitioner,

against

**DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL,
WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CHARLES H. LIEB,
Counsel for Petitioner,
733 Third Avenue,
New York 17, New York.

ROBERT H. BLOOM,
PASKUS, GORDON & HYMAN,
of Counsel.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

DOCKET NO.

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL,
WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE
UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John Wiley & Sons, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for a review of the judgment entered herein on January 11, 1963.

Opinions Below

The opinion and order of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 203 F. Supp. 171 and at page A-1, Appendix. The opinion of the Honorable Harold R.

Medina concurred in by the Honorable J. Joseph Smith, and the concurring opinion of the Honorable Irving R. Kaufman, in the Court of Appeals for the Second Circuit, reversing the order of the District Court with a direction to order arbitration, are reported at — F. 2d —, —, and at pages A-9 and A-35, Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on January 11, 1963 (p. A-37, Appendix). A timely petition for rehearing, filed on January 25, 1963, was denied on February 5, 1963 (p. 162a of certified record).

The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28 U.S.C. §1254(1).

Questions Presented

1. Is the court or the arbitrator to determine the issue of so-called "procedural arbitrability", that is, whether there has been due compliance with the procedural conditions precedent to the contractual obligation to arbitrate.

2. Where a company having a collective bargaining agreement with a union merges into a larger, non-unionized company and the merged company's employees are absorbed as a minority accretion and integrated with the employees of the surviving company into a single unit not represented by the union, is the court or the arbitrator to determine whether the surviving company is contractually obligated, under the merged company's agreement, to arbitrate questions arising upon and after the merger.

3. Is an employer required to arbitrate a union's claim that service under an expired collective bargaining agree-

ment created such "vested" or "property" rights in the employees that the employer is required for an indefinite period after the expiration date of the agreement—

a. to continue to accord to such employees seniority and job security rights, rights to vacation and severance pay, and coverage under the union welfare plans.

b. to remain bound under the "grievance provisions" of the expired agreement to arbitrate future disputes.

4. Is the union after the termination of its collective bargaining agency the proper party to enforce a collective bargaining agreement with the employer.

Statutes Involved

Labor Management Relations Act, 1947, Section 301(a), 61 Stat. 156, 29 U.S.C. § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of Case

Respondent (the "Union") commenced this action in the United States District Court for the Southern District of New York on January 23, 1962 to compel petitioner ("Wiley") to proceed to arbitration with the Union on certain grievances alleged to have arisen under

a collective bargaining agreement which the Union had entered into with Interscience Publishers, Inc. ("Interscience"), and which by its terms was to expire on January 31, 1962. The District Court had jurisdiction of the case under Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185(a). *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Wiley and Interscience, theretofore unrelated technical and scientific publishers, had merged for bona fide business reasons on October 2, 1961. Interscience had been the smaller company, with 40 of its 80 employees covered by the collective bargaining agreement. Wiley before the merger had 300 employees, none of them represented by a union.

At the time of the merger, the Interscience employees were integrated into the operations of Wiley and thereafter no longer constituted a distinct bargaining unit.

Neither prior to, nor at any time since the merger has the Union had any collective bargaining relationship with Wiley nor has it ever claimed that it represents a majority of the Wiley employees or of any appropriate collective bargaining unit in the Wiley establishment.¹

The Union was advised in advance of the contemplated merger and that the Interscience bargaining unit would be integrated into the larger and substantially identical Wiley unit not represented by the Union. Wiley took the position, both before and after the merger, that (1) it would not recognize the Union as a collective bargaining agent for any of its employees unless the Union was duly certified and (2) it would not consider itself bound by the collective bargaining agreement between the Union and

¹ The Union does claim the right to represent the former Interscience union employees, at least for the purposes of enforcing their alleged rights under the collective bargaining agreement, even though they do not constitute by themselves an appropriate collective bargaining unit.

Interscience. The Union took the position that, in view of Section 90 of the New York Stock Corporation Law,² Wiley was bound by the collective bargaining agreement and was required to recognize the Union, at least until the agreement expired on January 31, 1962.

Article XVI of the collective bargaining agreement³ between the Union and Interscience provided that "any differences, grievances or dispute between the Employer and the Union arising out of or relating to the agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute," and thereafter set forth a typical series of three "steps", culminating in a referral to arbitration.

The first two steps contained express time limitations and step 3 provided that "all grievances [defined to include any "difference, grievance, or dispute" within Article XVI] not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by the Employer and the Union." Article XVI further provided that "notice of any grievance [defined to include any difference, grievance or dispute within Article XVI] must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence." (§ 16.6)

The Union at no time prior to filing its complaint on January 23, 1962, nearly four months after the merger, made any demand for arbitration or in any manner indicated that it was invoking the grievance and arbitration provisions of the collective bargaining agreement with Interscience.

²Set forth at page A-14 (footnote 1), Appendix.

³Article XVI is set forth in full in the appendix to the opinion of the Court of Appeals, at page A-31, Appendix.

In its petition and complaint the Union sought to compel Wiley to submit the following issues to arbitration:

"(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

"(b) Whether as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

"(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

"(d) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

"(e) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract."

With one exception, all of the issues tendered for arbitration, insofar as they pertain to the period prior to the expiration of the collective bargaining agreement on January 31, 1962 are moot.* What the Union, essentially,

* No employee was separated from his employment, except at his own request, nor was there any other occasion for invoking the seniority or job security provisions of the contract. All employees who voluntarily resigned received severance payments in excess of the payments required under the contract. Vacation pay to the extent it had accrued through January 31, 1962 has been paid at the rate set forth in the contract. No employee has sought to invoke any grievance procedure nor has any employee asserted any grievance arising prior to January 31, 1962. The only grievance relating to the period prior to January 31, 1962 is the Union's claim that Wiley is required to make a contribution to the District 65 Security Plan and District 65 Security Plan Pension Fund for the four months ending January 31, 1962.

seeks to arbitrate is its claim that the conditions of employment and the grievance procedures contractually granted by Interscience for a fixed period of time, survived the expiration of the contract on January 31, 1962 and bind Wiley for an indeterminate time in the future.

Decisions of the Courts Below

The case was argued before the Honorable Sidney Sugarman on affidavits submitted by the parties. Judge Sugarman denied the Union's motion for arbitration. He assumed, without deciding, that the collective bargaining agreement between the Union and Interscience survived the merger and that Wiley was bound by its terms. He nevertheless held that the Union was not entitled to demand arbitration since "*the Union failed to avail itself of the procedures under the contract which were a condition precedent to arbitration*" (p. A-6, Appendix. Emphasis added).

As an alternate ground, he held that the issues tendered by the Union were not arbitrable, finding that it was "fair to conclude that it was the intention of the parties to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it" (p. A-6, Appendix).

Judge Medina in the Court of Appeals held that the District Court erred in considering the issue of "procedural arbitrability", and that the arbitrator and not the court should determine whether the union had adhered to the grievance procedure outlined in the contract (p. A-24, *et seq.*, Appendix).

In regard to the other issues raised in the case, Judge Medina rejected the Union's contention that Section 90 of the New York Stock Corporation Law was controlling, stating that federal, and not New York law determines the question of arbitrability. He held that under federal

law the consolidation did not "ipso facto terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement," but he declined to decide what those rights were (pp. A-15, A-16, Appendix). The decision of the Court of Appeals was expressly limited to the conclusion that the consolidation did not preclude the Union "from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract," and that Wiley was required to "proceed to arbitration with representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation" (pp. A-16, A-17, Appendix. Emphasis added).

The Court of Appeals has thus committed the issue of *arbitrability*—whether or not Wiley was bound to arbitrate, as well as what issues it must arbitrate—to the arbitrator, and not the court, for determination.*

Judge Medina also held that the Union was the proper party to enforce the rights claimed for the employees under the collective bargaining agreement notwithstanding that its collective bargaining agency had terminated as a result of the disappearance of the Interscience unit.

* That the question of the arbitrability itself has been submitted to the arbitrator is not left in doubt. Judge Kaufman, in his concurring opinion, states (p. A-36, Appendix):

"What we decide here is that since the arbitrator may find that the agreement was intended to bind successors, and that since Wiley is the successor of Interscience, then Wiley is a potential party to a binding arbitration decree. Our mere refusal to determine that Wiley is not a proper party defendant in this judicial proceeding does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the *obligation to arbitrate* or the obligation to respect the allegedly 'vested rights' of the employees." (Emphasis in last sentence added.)

Finally, Judge Medina held that the issues raised by the proposed submission are arbitrable, even though they relate to terms of employment and grievance procedures for a period *after* the expiration of the collective bargaining agreement and the disappearance of the bargaining unit, since the right to such terms of employment and grievance procedures are claimed to have vested during the term of the expired agreement.

Reasons for Allowance of the Writ

The petition for a writ of certiorari should be granted because:

1. As noted by Judge Medina (pp. A-24, A-25, Appendix) the decision of the Court of Appeals is in direct conflict with the decisions of the United States Courts of Appeals for the First and Seventh Circuits, and with District Court decisions in the Eighth, Ninth and Tenth Circuits, each of which has expressly held that the issue of "procedural arbitrability" is for the court and not the arbitrator.

2. The Court of Appeals in referring the issue of arbitrability to the arbitrator rather than to the court has decided a federal question in a way in conflict with applicable decisions of this Court.

3. The Court of Appeals has determined important and "extraordinarily complex" questions of federal law "which will have broad ramifications in the growing and yet unshaped field of federal labor law" and which have not been, but should be, settled by this Court.

4. The holding of the Court of Appeals that a Union may enforce a collective bargaining agreement after

* Concurring Opinion of Judge Kaufman, p. A-35, Appendix.

the termination of its collective bargaining agency is in conflict in principle with decisions of the Courts of Appeals for the Fourth and Sixth Circuits.

Argument in Support of Reasons

1.

The decision of the Court of Appeals is in direct conflict with decisions of the United States Courts of Appeals for the First and Seventh Circuits and with District Court decisions in the Eighth, Ninth and Tenth Circuits.

As a result of the decision of the Court of Appeals, there is now a clear split of authority in the Circuit Courts on the question of whether the court or the arbitrator should determine the issue of so-called "procedural arbitrability." Prior to this decision the strong weight of authority in the Federal Courts held that procedural arbitrability was for the court and not the arbitrator. *Boston Mutual Life Insurance Co. v. Insurance Agents International*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers v. American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied, 363 U. S. 845 (1960), petition for rehearing denied, 364 U. S. 856 (1960); *Truck Drivers v. Grosshans & Petersep*, 209 F. Supp. 164 (D. Kan. 1962); *United Brick & Clay Workers v. Gladding, McBean & Co.*, 192 F. Supp. 64 (S. D. Calif. 1961); *General Tire & Rubber Co. v. Local 512, United Rubber Workers of America, AFL-CIO*, 191 F. Supp. 911 (D.R.I. 1961), affirmed 294 F. 2d 937 (1st Cir. 1961); *International Union of Operating Engineers v. Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958). See also *Black-Crawson Company v. Machinists, Lodge 355*, 212 F. Supp. 818 (N.D.N.Y. 1962), at p. 823, affirmed 46 CCH Lab. Cas. par. 17,996 (2d Cir. 1962).

Contrary federal authority, prior to the decision of the Court below, was substantially limited to the decisions of

the District Courts in, and the Court of Appeals for, the Third Circuit.

Since the decision in the Court below was rendered, the Federal Courts have continued to divide on this issue.*

A similar split of authority has developed in the state courts. Since state courts have concurrent jurisdiction

* *Radio Corp. of America v. Association of Professional Engineering Personnel*, 291 F. 2d 105 (3d Cir. 1961); *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, 187 F. Supp. 97 (E. D. Pa., 1960); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 188 F. Supp. 225 (W. D. Pa., 1959), affirmed, 283 F. 2d 93 (3d Cir., 1960); *United Cement Workers International Union, AFL-CIO v. Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa., 1958) (purporting to apply state law); *Insurance Agents International Union, AFL v. Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa., 1954) (purporting to apply state law).

The Fifth Circuit in *International Association of Machinists v. Hayes Corp.*, 296 F. 2d 238 (1961), cited by the Court of Appeals, at footnote 6, page A-25, Appendix, determined that the union's claim was procedurally arbitrable, and did not, as the Court of Appeals in the case at bar has done, submit this issue to the arbitrator. However, see *Deaton Truck Line, Inc. v. Teamsters, Local 612*, — F. 2d —, 46 CCH Lab. Cas. ¶ 17,910 (5th Cir., filed Nov. 16, 1962).

In *Local 971, United Automobile Workers AFL-CIO v. Bendix-Westinghouse Automotive Workers Co.*, 188 F. Supp. 842 (N. D. Ohio 1960), cited by the Court of Appeals, at footnote 7, page A-25, Appendix, the court was not presented with, nor did it indicate an opinion as to, the question of "procedural arbitrability" as that term is used in this case.

* *Electrical, Radio & Machine Workers, Local 748 v. Jefferson City Cabinet Company*, — F. 2d —, 46 CCH Lab. Cas. ¶ 18,100 (6th Cir., filed Feb. 23, 1963) (for the arbitrator); *Grocery & Food Products Warehouse Employees, Local 738 v. Thomson & Taylor Spice Co.*, — F. Supp. —, 46 CCH Lab. Cas. ¶ 18,103 (N. D. Ill., filed Feb. 13, 1963) (for the court).

* Procedural arbitrability is for the court: *Vulcan-Cincinnati, Inc. v. Steelworkers*, 173 N. E. 2d 709 (Ohio App. 1960); *Matter of Board of Education [Heckler Electric Co.]*, 7 N. Y. 2d 476, 199 N.Y.S. 2d 649 (1960) (citing *Boston Mutual* with approval); *Local 459, International Union of Electrical Workers v. Remington Rand*, 19 Misc. 2d 829, 191 N.Y.S. 2d 880 (Sp. Term N. Y. Co. 1959).

For the arbitrator: *Southwestern New Hampshire Transportation Company v. Durhan*, 102 N. H. 169, 152 A. 2d 596 (1962).

to enforce collective bargaining agreements within the purview of § 301(a) of the Labor Management Relations Act (*Charles Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962)) but must apply federal law in such cases (*Local 174, Teamsters v. Lucas Flour Co.*, 369 U. S. 95 (1962)), it becomes doubly important that this Court resolve this very frequently litigated issue.

2.

The Court of Appeals in referring the issue of arbitrability to the arbitrator rather than to the court has decided a federal question in a way in conflict with the applicable decisions of this Court.

This Court has recently stated that "under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties" *Atkinson v. Sinclair Refining Company*, 370 U. S. 238, 241 (1962) (Emphasis added).

In two respects the Court of Appeals has here referred the issue of arbitrability to the arbitrator.

Substantive Arbitrability

The issue presented by the Union's action to compel arbitration is whether Wiley is contractually obligated, because of the merger, and despite the absence of a "successor" clause, to arbitrate the issues tendered by the Union. A decision on "substantive arbitrability"—whether Wiley has agreed, or is bound by an agreement to arbitrate the issues tendered—must be made. The question is who is to render that decision, the court or the arbitrator? The Court of Appeals has committed this determination of arbitrability to the arbitrator. (See p. 8,

supra.) The decisions of this Court unequivocally require that it be made by the Court."

Procedural Arbitrability

While use of the labels "procedural arbitrability" and "substantive arbitrability" is a convenient shorthand to describe the type of case before the Court, the basic question presented in both is identical. Has the reluctant party breached its promise to arbitrate? Accordingly, the Court must determine whether the conditions precedent, in this case compliance with the grievance procedure, have been satisfied in order to determine whether Wiley "breached [its] promise to arbitrate".

The statement in *United Steelworkers v. American Manufacturing Co.*, *supra*, at 568, that "... it [the function of the Court] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract" sets forth a rule to determine, in the context of a dispute on substantive arbitrability, whether the alleged grievance was arbitrable. The Court of Appeals has erroneously read this statement as a rule determining who is to decide arbitrability.

²⁰ A party may contract to refer the question of arbitrability itself to an arbitrator. In such a case, a refusal to arbitrate on the grounds that the grievance was not arbitrable, would itself be a breach of contract, calling for the exercise of the power of the court without deciding arbitrability. *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564 (1960), at 571 (Brennan, J., concurring). However "where the assertion by the claimant is that the parties excluded from court determination not merely the decision on the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." (*United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574 (1960), at fn. 7, page 583. The decision of the Court of Appeals to refer the question of arbitrability to the arbitrator did not purport to rest on any such "clear demonstration."

The Court of Appeals has determined important questions of federal law which have not been, but should be settled by this Court.

The Court of Appeals' decision compels an employer to arbitrate a claim by a union that certain terms of employment and a specified grievance procedure continued, as "vested rights", after the disappearance of the bargaining unit and the expiration of the contract period for which they were expressly granted.

The issue in this case is not the validity of the Union's contentions, but whether the employer can be compelled to arbitrate them.

The question will arise everytime where, upon the expiration of a collective bargaining agreement containing an arbitration clause, a new collective bargaining agreement is not entered into. This may be occasioned by an event which terminates the collective bargaining unit, such as the merger of the unit into a larger unit or the removal of operations to another locality, or by the failure of the Union to maintain its majority status, or simply by the inability of the parties to agree to a new contract.

The Court of Appeals failed to recognize that the rules for determining arbitrability laid down by this Court in the *Steelworkers* cases¹¹ had reference to disputes pertaining to a subsisting collective bargaining relationship under a current collective bargaining agreement. The considerations adverted to by the Court in those cases are not applicable to the claims which the Union here seeks to arbitrate,

¹¹ *United Steelworkers of America v. American Manufacturing Co.*, supra; *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, supra; *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).

which relate to a period *after* the termination of the collective bargaining agreement and relationship.

The Union's claims present a new dimension to labor-management relations, and the selection of the proper tribunal to resolve claims of this nature is obviously of far-reaching importance.

4.

The holding of the Court of Appeals that a Union may enforce a collective bargaining agreement after the termination of its collective bargaining agency is in conflict in principle with the decisions of the Courts of Appeals for the Fourth and Sixth Circuits.

The Courts of Appeals for the Fourth and Sixth Circuits have held that upon the termination of its collective bargaining agency, the union's right to enforce the collective bargaining agreement likewise terminates. *Glendale Manufacturing Co. v. Garment Workers, Local 520*, 283 F. 2d 936 (4th Cir. 1960), cert. den. 366 U. S. 950 (1961); *Modine Manufacturing Co. v. Machinists*, 216 F. 2d 326 (6th Cir. 1954). See also *Retail Clerks v. Montgomery Ward & Co.*, 45 CCH Lab. Cas. par. 17,735 (N. D. Ill. 1962); *Kenin v. Warner Brothers Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960).

In *Modine* a rival union had been certified; in *Glendale* the union which had negotiated the contract had been formally decertified. In this case the termination of the collective bargaining agency resulted from the integration of the bargaining unit, formerly represented by the Union, into a larger bargaining unit not represented by the Union. The Court of Appeals distinguished *Modine* and *Glendale* on the ground that here there was no formal decertification of the Union nor certification of a rival union. Decertification was not necessary, since the Union

has never seriously sought to act as collective bargaining agent for any of the Wiley employees, and the Wiley employees have exercised their undoubted right not to select a collective bargaining agent.

The case at bar may not be validly distinguished on the ground suggested by the Court of Appeals and the basic conflict with the underlying rationale of *Modine* and *Glendale* remains.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Dated: March 12, 1963.

Respectfully submitted,

CHARLES H. LIEB,
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ROBERT H. BLOOM,
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Of Counsel.

APPENDIX

**Opinion and Order of the District Court for the
Southern District of New York.**

**UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK**

62 Civ. 378

**In the Matter of David Livingston, as President of District
65, Retail, Wholesale & Department Store Union, AFL-
CIO,**

Plaintiff,

against

John Wiley & Sons, Inc.,

Defendant.

OPINION

**WEISMAN, ALLAN, SPETT & SHRINBERG, Esqs., Attorneys
for Plaintiff, Irving Rozen, Esq., Of Counsel, 1501
Broadway, New York 36, New York.**

**PASKUS, GORDON & HYMAN, Esqs., Attorneys for Defendant,
Charles H. Lieb, Esq., Robert H. Bloom, Esq., Of
Counsel, 733 Third Avenue, New York 17, New York.**

SIDNEY SUGARMAN, U.S.D.J.

SUGARMAN, D. J.:

**On February 1, 1960 Interscience Publishers, Inc., a
New York corporation (herein Interscience or Employer),
entered into a contract with District 65, Retail, Wholesale**

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& Department Store Union, AFL-CIO (herein the Union), wherein Interscience recognized the Union as exclusive bargaining agent of the clerical and shipping employees of Interscience. The contract was for a term ending January 31, 1962 and provided for its automatic renewal unless notification by either party 60 days before an expiration date that changes in the agreement were desired.

On April 8, 1960 Interscience and the Union amended the contract to provide that the collective bargaining unit would not be reduced by lay-off below 26 employees. On March 6, 1961 Interscience and the Union amended the contract with respect to the check-off provisions thereof.

Article XVI of the agreement of February 1, 1960 deals with "Grievances: Adjustment of Disputes: Arbitration". Section 16.0 provides that differences, grievances or disputes between Interscience and the Union arising out of or relating to the agreement, its interpretation, application or enforcement "shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute". Section 16.0 then sets up three steps as to the "procedures".

The first step provides that when the grievance first arises it "shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department". If the grievance is not satisfactorily settled within two working days after the conference, it is to be reduced to writing and "signed by the Employer representative and the affected employee".

The second step provides that within five working days after its reduction to writing the grievance should be the subject of a conference between an officer of the Employer or its representative and the Union Shop Committee or its representative.

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The third step provides that in the event that the grievance is not resolved in step two it "shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union".

Section 16.1 provides for the method of selecting an impartial arbitrator if the parties fail to agree upon an arbitrator pursuant to step three of Section 16.0. The remaining sections of Article XVI deal with how the parties shall conduct themselves while the arbitration is pending.

On August 11, 1961 Interscience entered into an agreement with John Wiley & Sons, Inc. which resulted in the consolidation on October 2, 1961 of John Wiley & Sons, Inc. and Interscience into the defendant consolidated corporation John Wiley & Sons, Inc. (herein Wiley and the Company). No one contends that the consolidation was intended to enable Interscience to run away from its agreement with the Union or that the consolidation of Interscience and John Wiley & Sons, Inc. into Wiley was for anything other than bona fide business reasons.

Both before and after the consolidation on October 2, 1961, the Union contended that Wiley was bound to recognize it as the exclusive bargaining agent of the clerical and shipping employees of Interscience who had been merged into the Wiley organization. Upon the continued refusal of Wiley to accede to the demands of the Union, the latter filed a complaint in this court on January 23, 1962, demanding judgment "directing that the defendant [Wiley] be compelled to submit to arbitration on the questions herein referred to, and directing said defendant to proceed with said arbitration to final award, together with costs and disbursements of this action". The complaint predicates jurisdiction of the cause upon "Section 301 of the Labor-Management Relations Act, . . . 29 U.S.C. Sec. 185 and the United States Arbitration Act, Title 9, U.S.C."

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The Union by order to show cause returnable January 30, 1962 and adjourned to and argued on March 6, 1962, seeks an order directing Wiley to "submit to arbitration with the said Union on the following issues:—

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract;

and directing said Company to proceed with arbitration to final award; and why the Union should not have such other and further and different relief as to this Court may seem just and proper in the premises"

The Union *inter alia* argues that Section 90 of the Stock Corporation Law of the State of New York binds Wiley to observe the contract of February 1, 1960 between Interscience and the Union notwithstanding the consolidation. The pertinent portion of Section 90 provides that:

"such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and

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obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations".

Wiley *inter alia* argues that the contract between Interscience and the Union came to an end upon the consolidation on October 2, 1961 and that it is not bound to recognize or deal with the Union as the bargaining agent for the employees formerly represented by the Union and absorbed into the Wiley organization.

Assuming that the Union's contention that its agreement with Interscience survived the consolidation and that Wiley is bound to observe its terms, it must nevertheless fail on this motion. Section 16.6 of the agreement provides that:

"Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance."

It is undisputed that no notice of any grievance was so filed within four weeks after its occurrence nor were any of the procedures set up in Article XVI of the contract followed herein.

Arbitration is a contract obligation and we must look within the four corners of the contract which it is asserted makes a dispute arbitrable. The entire structure of Article XVI of the contract of February 1, 1960 in my view contemplates arbitration of a grievance between an "affected employee" represented by the Union, and the Employer. The contract does not indicate that arbitration was within the contemplation of the parties under the facts at hand, i.e., a consolidation of the Employer with a third party

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and its effect upon the rights of the individual employees within the collective bargaining group and upon the Union as their exclusive bargaining agent.

It is fair to conclude that it was the intention of the parties to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it, because Section 16.5 of the contract between Interscience and the Union specifically excludes from arbitration such matters as:

- "(1) the amendment or modification of the terms and provisions of this agreement;
- (2) salary or minimum wage rates as set forth herein;
- (3) matters not covered by this agreement; and
- (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement."

But even if it be said that each individual employee thus affected had a grievance for which the Union under the contract was designated as his negotiating agent, the procedures set up by the contract for the resolution of those individual grievances were completely ignored and constituted "an abandonment of the grievance".

While negotiations were had for some time prior to June 27, 1961 between the business agent of the Union and the attorney for Interscience, after the public announcement in late May or early June 1961 of the proposed consolidation of Interscience and John Wiley & Sons, Inc. into Wiley, and counsel for the Union as early as June 27, 1961 advised Interscience by letter that "any impairment of the rights of the employees will be resisted to the fullest possible extent under the law", the Union failed to avail itself of the procedures under the contract which were a condition precedent to arbitration. It had

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the entire period from late May, when first public announcement was made of the proposed consolidation, at least until August 11, 1961 when Interscience and John Wiley & Sons, Inc. agreed to consolidate into Wiley, and possibly until October 2, 1961 when the certificate of consolidation of Wiley was actually filed in the Secretary of State's office, to initiate individual grievance machinery under the contract.

Had it done so it probably would have resolved prior to the actual consolidation the issues which it now seeks to resolve by arbitration because the agreement of August 11, 1961 between Interscience and John Wiley & Sons, Inc. to consolidate into Wiley provides in Paragraph VIII thereof as follows:

"Anything herein or elsewhere to the contrary notwithstanding this agreement may be terminated and abandoned prior to the effective date of consolidation if:

(a) In the judgment of the board of directors of either of the corporations, any material litigation shall be pending or threatened against or affecting either of the corporations, or any of their respective assets, or the merger and consolidation, which renders it inadvisable to proceed with the merger and consolidation; . . ."

Whether the contract of February 1, 1960 contemplated that the "Grievances: Adjustments of Disputes: Arbitration" procedures of Article XVI applied to the situation herein presented, or was intended to cover any grievances between individual employees and Interscience or both; the failure of the Union to avail itself of the procedures delineated in the contract constituted an

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abandonment of the grievance, individual or collective, pursuant to Sections 16.0 and 16.6 of the agreement.

Accordingly, the Union's motion that Wiley be compelled to submit to arbitration with it on the aforesaid issues is denied.

It is so ordered; no further order is necessary.

SIDNEY SUGARMAN
Sidney Sugarman
United States District Judge

Dated: New York, New York, March 29, 1962

**Opinion of the United States Court of Appeals
for the Second Circuit.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 101—October Term, 1962

(Argued November 5, 1962 Decided January 11, 1963)

Docket No. 27629

**In the Matter of DAVID LIVINGSTON, as President of District
65, Retail, Wholesale and Department Store Union,
AFL-CIO,**

Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC.,

Defendant-Appellee.

Before:

MEDINA, SMITH and KAUFMAN, Circuit Judges.

**Appeal from an order of the United States District
Court for the Southern District of New York, Sidney
Sugarman, Judge.**

**District 65, Retail, Wholesale and Department Store
Union, AFL-CIO appeals from an order denying its motion
to compel arbitration pursuant to the terms of a collective
bargaining agreement. Opinion below reported at 203 F.
Supp. 171. Reversed.**

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for the Second Circuit.*

IRVING ROSEN, New York, N. Y. (Myron Nadler and Weisman, Allan, Spett & Sheinberg, New York, N. Y., on the brief) *for plaintiff-appellant.*

CHARLES H. LIEB, New York, N. Y. (Robert H. Bloom and Paskus, Gordon & Hyman, New York, N. Y., on the brief), *for defendant-appellee.*

MEDINA, Circuit Judge:

District 65, Retail, Wholesale and Department Store Union, AFL-CIO appeals from an order of the District Court for the Southern District of New York denying its motion to compel arbitration under a collective bargaining agreement. The opinion below is reported at 203 F. Supp. 171.

Beginning in 1949 the Union entered into collective bargaining agreements with Interscience Publishers, Inc., the last one dated February 1, 1960, for a term of two years ending January 31, 1962. None of these agreements was stated in terms to be binding on Interscience "and its successors." On October 2, 1961 Interscience effected a consolidation for bona fide business reasons with another publishing firm, John Wiley & Sons, Inc. A dispute arose with respect to the effect of the consolidation on the status of the collective bargaining contract and the Union. Interscience before the consolidation, and Wiley thereafter took the position that the agreement was automatically terminated for all purposes by the consolidation, and that all rights of the Union and the employees arising out of the agreement were at an end. The Union adhered throughout the discussions and correspondence both before and after the consolidation to the view that the agreement was not terminated by the consolidation and that certain rights

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had become "vested" which Wiley must recognize. The details of this controversy will be more fully described shortly. The upshot was that the Union demanded arbitration of the dispute, under Article XVI of the Agreement (set forth in full in the Appendix to this opinion), relating to "Grievances: Adjustment of Disputes: Arbitration," and on January 23, 1962, the Union commenced this action against Wiley to compel arbitration. The District Court assumed that the agreement survived the consolidation, but denied arbitration on two grounds: that the agreement should be so construed as "to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it"; and that, even if not so limited, the Union has failed to avail itself of the grievance procedure described in the agreement and had thus abandoned any rights it might have had to arbitration of the dispute.

We think it clear that the District Court had jurisdiction of the case under Section 301 of the Labor Management Relations Act, 29 U. S. C. Section 185, and that the appeal by the Union is properly before us. *Textile Workers Union v. Lincoln Mills*, 1957, 353 U. S. 448; *General Electric Co. v. Local 205, United Electrical Workers*, 1957, 353 U. S. 547; *Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, 1957, 353 U. S. 550. We also hold, as matter of federal law, (1) that the agreement and rights arising therefrom were not necessarily terminated by the consolidation, and that Wiley and the Union are proper parties to the arbitration proceeding; (2) that the terms of the agreement contemplated the arbitration of just such a dispute or controversy as the one before us and that the attempt to arbitrate here is not an improper effort to secure status as collective bargaining agent for the negotiation of a new contract, nor is it an attempt to secure allegedly proscribed "quasi-

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legislative" arbitration; (3) that issues raised by Wiley arising out of the Union's alleged failure to comply with certain requirements of the agreement relative to so-called grievance procedure are matters to be decided by the arbitrator.

The facts, sketched above, may be stated more fully as follows:

On October 2, 1961 Interscience employed 80 persons, of whom 40 were covered by the 1960 contract; Wiley employed 300 persons. Interscience, with a single plant in New York City, did an annual business of \$1,000,000; Wiley, an older company, had three substantially larger plants, and did an annual business of \$9,000,000.

The Union learned of the proposed consolidation in June of 1961 and on June 27 wrote Interscience, stating its position that the contract would remain in force notwithstanding the consolidation. On September 19, 1961 Interscience initiated conversations with the Union, in the course of which Interscience insisted that the contract would end upon consolidation. On September 21, 1961 Interscience wrote its employees, stating its views on termination and offering jobs at the Wiley plant in New York City. On October 2, 1961, the effective date of the consolidation, Wiley wrote the Union stating that the contract was terminated.

All of Interscience's 80 employees were subsequently employed by Wiley, but 11 later resigned and received severance pay voluntarily granted by Wiley. The Union does not allege discrimination against these persons, but attributes their resignation to worsened working conditions. Wiley has placed the Interscience employees under its own pension plan, crediting them for past service with Interscience, but it does not recognize their seniority or other rights under the Interscience contract, nor does it recognize the appellant Union or any other union.

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The Interscience contract obliged Interscience to make quarterly payments into an employee pension fund. The Union contends that Interscience's payment for the third quarter of 1961 was inadequate, and that Wiley is obliged and has failed to make up this deficit and also to make the payment due for the fourth quarter. The total claim amounts to \$8,000. The contract also contains provisions according to the Interscience employees rights regarding seniority, job security, grievance procedure, and vacation and severance pay.

On January 23, 1962 the Union commenced this action in the District Court to compel Wiley to arbitrate the dispute between the parties concerning the effect of the consolidation upon the contract and the so-called "vested" rights of the Union and the employees to continued payments by Wiley to the Interscience employee pension fund and to seniority, job security, grievance procedure, and vacation and severance pay, "now and after January 30, 1962."

I

The question of "substantive arbitrability" is for the court not for the arbitrator to decide. *Atkinson v. Sinclair Refining Co.*, 1962, 370 U. S. 238, 241. The controlling law is not New York law but federal law. *Textile Workers Union v. Lincoln Mills*, *supra* at 456. The sources of that law, to be fashioned by judicial inventiveness, are the express provisions of the national labor laws, the basic policies underlying these laws, "state law, if compatible with the purpose of Section 301" and which "will best effectuate the federal policy," and accepted principles of traditional contract law. *Id.* at 457; *Local 174, Teamsters Union v. Lucas Flour Co.*, 1962, 369 U. S. 95, 105. See Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N. Y. U. L. Rev.

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448 (May, 1962); Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of The Law under Section 301*, 28 Univ. Chi. L. Rev. 707 (1961).

The Union tells us that under Section 90 of the New York Stock Corporation Law¹ the contract did not automatically terminate because the provisions of this statute are to the effect that the consolidated corporation is "deemed to have assumed" and "shall be liable" for "all liabilities and obligations" of the constituent corporation just as if it "had itself incurred such liabilities or obligations." But this legislation is clearly not binding upon us, and we may or may not find that the rule thus formulated, with or without qualifications or in some modified form, "will best effectuate the federal policy." We have found no case formulating a rule of federal law on the point at issue here, and none has been called to our attention. We must accordingly, to the best of our competence, and giving due weight to the legislation of the Congress in the area of labor-management relations and other sources

¹ *Rights of creditors of consolidated corporations.*

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.

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relevant to the task, including the provisions of Section 90 of the New York Stock Corporation Law, fashion for the first time the rule of federal law that is to govern the decision of the first and preliminary question presented for our consideration: Did the consolidation abruptly terminate the collective bargaining agreement and the rights of the Union and the employees created or arising thereunder?

We think it clear and we decide and hold that the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements (*Textile Workers Union v. Lincoln Mills*, *supra* at 453-4; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 1960, 363 U. S. 574, 578; *Local 174, Teamsters Union v. Lucas Flour Co.*, *supra* at 105; *Drake Bakeries Inc. v. Local 50*, 1962, 370 U. S. 254, 263) can be fostered and sustained only by answering this question in the negative. And we reach this conclusion despite the fact that the agreement contains no statement that its terms are to be binding upon Inter-science "and its successors", and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled. Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation.

A further principle, particularly applicable in the formulation of new segments of federal labor law, is, we think, the principle of restraint that requires us to formulate the rule that is decisive of the case before us, and to go no further.

Thus, while we do hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargain-

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ing agreement,² we do not decide what those rights are. As will appear in a later portion of this opinion, the power and function of making a decision, or a series of decisions, with respect to these rights, have been reserved by the parties for the arbitrator in the course of the arbitration proceedings that will follow our reversal of the order appealed from. *Cf. Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, 1 Cir., 1956, 233 F. 2d 104, 110, affirmed, 1957, 353 U. S. 550. Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract.

Several additional objections to arbitration have been made on the ground of improper parties. Wiley contends that it cannot be made a party to the arbitration proceeding because it was not a party to the agreement and the arbitration clause was not binding upon it. We think that our discussion above disposes of this objection as well. When negotiating and before effectuating the consolidation of October 2, 1961, Wiley was aware of the existence of

² As this action was commenced prior to January 31, 1962, the termination date of the agreement, our decision is entirely consistent with *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 2 Cir., filed December 10, 1962, where we held that grievances arising after the expiration of a collective bargaining agreement are not arbitrable.

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the collective bargaining agreement and of its obligations under the New York Stock Corporation Law Section 90. In view of the national policy of promoting industrial peace and stability and the special function of arbitration in promoting these ends, above adverted to, we think and hold, in the exercise of our duty to fashion an appropriate rule of federal labor law, that it is not too much to expect and require that this employer proceed to arbitration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation.³

³ The National Labor Relations Board has specifically recognized that the rule (see *N. L. R. B. v. Aluminum Tabular Corp.*, 2 Cir., 1962, 299 F. 2d 595, 598) that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise, does not control the issue, presented in the instant case, of the binding character and meaning of contractual rights under a preexisting agreement. *Cruse Motors, Inc.*, 1953, 105 N. L. R. B. 242, 248. This is because of the inapplicability of the rationale of the rule, which is that certification "is an official pronouncement by the Board that a majority of the employees in a given work unit desire that a particular organization represent them in their dealings with their employer," and that where there has been a substantial change in the nature of the employment enterprise "there may well be a consequent change in the nature of the work required of the employees resulting in differences in their working condition problems. Thus the employees may feel that they can be better served by another employee organization." *N. L. R. B. v. Armato*, 7 Cir., 1952, 199 F. 2d 801, 803. See also *N. L. R. B. v. Lunder Shoe Corp.*, 1 Cir., 1954, 211 F. 2d 284, 286.

Similarly inapplicable are cases holding that an existing agreement will not bar a Representation petition under Section 9(c) of the Labor Management Relations Act when there has been a substantial change in the nature of the employment enterprise. The rationale of these cases, inapplicable here, is that "sound and stable labor relations will best be served by allowing the employees in the reconsti-

(Footnote continued on following page)

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Wiley also argues that the Union is not the proper party to present the claims of these employees. But the fact that the contract has now terminated does not itself bar arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 1960, 363 U. S. 593. There is no showing that the Union here has been decertified. *Glen- dale Mfg. Co. v. Garment Workers, Local 520*, 4 Cir., 1960, 283 F. 2d 936, cert. denied, 1961, 366 U. S. 950; *Modine Mfg. Co. v. Machinists*, 6 Cir., 1954, 216 F. 2d 326. There is here no rival union, whose rights would be interfered with by the Union's pressing of these employee claims. *Kenin v. Warner Bros. Picture, Inc.*, S. D. N. Y., 1960, 188 F. Supp. 690. In short, there is no showing that the freedom of choice of any employee would in any way be infringed by the Union's pressing of the employee claims under a preexisting agreement, and we are aware of no reason why the Union may not enforce arbitration of a

(Footnote continued from preceding page)

tuted units to determine for themselves the labor organization which they now desire to represent them." *L. B. Spear & Co.*, 1953, 106 N. L. R. B. 687, 689. Cases involving enforcement of previously obtained orders of the National Labor Relations Board against a successor employer, which may or may not be favorable to Wiley's position (see Annot., 46 A. L. R. 2d 592, 1956), are also without significant effect here because of the specific limitations imposed in those cases by Rule 65(d) of the Federal Rules of Civil Procedure (*Regal Knitwear Co. v. N. L. R. B.*, 1945, 324 U. S. 9, 13-14) and the public policy that one should "not be adjudged [guilty] of wrongdoing * * * without complaint, notice, full opportunity to present [one's] * * * defenses and the other essential requirements of due process of law." *N. L. R. B. v. Birdsall Stockdale Motor Co.*, 10 Cir., 1953, 208 F. 2d 234, 237.

Livingston v. Gindoff Textile Corp., S. D. N. Y., 1961, 191 F. Supp. 135, cited by Wiley, is also without application since the original employer there underwent a complete dissolution, rather than a consolidation, and was found to have no legal or substantial factual relationship with the successor employer. Nor was such a showing made in *Office Employees International Union, Local 153, AFL-CIO v. Ward-Garcia Corp.*, S. D. N. Y. 1961, 190 F. Supp. 448.

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dispute or controversy concerning rights alleged to have arisen out of and pursuant to the terms of the collective bargaining agreement which it negotiated, especially where there appears to be no other person or entity in a position legally to enforce arbitration.

II

The issues tendered by the Union for arbitration are:

(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962;

(b) Whether, as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962;

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect;

(d) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract;

(e) Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

In its brief and on oral argument the Union characterized the rights claimed by it on behalf of itself and the employees it represents as "property rights" or "vested rights" built up by the employees "during their long years of employment" in accordance with the terms of the col-

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lective bargaining agreement.* Hence the essence of the proposed submission is that the arbitrator determine the nature of and proper remedy for implementing those rights, if any, as to seniority, pension plan, job security, grievance procedure, and vacation and severance pay, which he finds accrued during the term of the collective bargaining agreement. In other words, implicit in the submission is the possibility that the arbitrator may decide that no rights to seniority, pension plan, job security, grievance procedure, or vacation and severance pay, survived the consolidation or the date of expiration of the

* In *Goodall-Sanford, Inc. v. United Textile Workers, AFL Local 1802*, *supra*, at 110, the First Circuit recognized that:

"Even without an express reference to that possibility in the contract, in view of the increasingly complex use of compensation in the form of 'fringe benefits,' some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern."

The possibility of such "vested" rights has been recognized specifically with respect to vacation and severance pay [*In re Wil-Low Cafeterias*, 2 Cir., 1940, 111 F. 2d 429, 432; *Botany Mills, Inc. v. Textile Workers Union of America, AFL-CIO*, 50 N. J. Super. 18, 141 A. 2d 107 (1958); *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't., 1955), affirmed *sub nom. Potoker v. Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 161 N. Y. S. 2d 609, 141 N. E. 2d 841 (1957)]; seniority rights [*Zdanok v. Glidden*, 2 Cir., 1961, 288 F. 2d 99]; and pension plan rights [*New York City Omnibus Corp. v. Quill*, 189 Misc. 892, 894-6, 73 N. Y. S. 2d 289, 291-3 (Sup. Ct. 1947), modified on other grounds, 272 App. Div. 1015, 79 N. Y. S. 2d 925 (1st Dep't., 1947), affirmed, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy v. Valentine*, 268 N. Y. 228, 197 N. E. 260 (1934)]. Cases holding that no such rights in fact exist, such as *Oddie v. Ross Gear & Tool Co.*, 6 Cir., 1962, 305 F. 2d 143, 150, recognize that the matter is solely one of the "construction of the agreement." See Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Nw. U. L. Rev. 646, 651 (1959).

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collective bargaining agreement. It is not our function to express any opinion on the subject, provided the agreement contemplates that such a question or congeries of questions was to be decided by arbitration. *United Steelworkers of America v. American Mfg. Co.*, 1960, 363 U. S. 564, 567-9.*

* We realize that there may be serious difficulties in giving to the Interscience employees special treatment in preference to the Wiley employees of long standing. Perhaps the arbitrator can work out some fair lump sum settlement which would avoid later friction. Be that as it may, the very fact that in the instant case we are presented with such difficult issues in a new and important field as yet largely unexplored, is ample reason why we must, as we do, leave the merits to the arbitrator whose creative role in the interpretation of collective bargaining agreements has been well remarked upon. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 578-81; Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-93. (1959).

Of course, if the arbitrator in deciding the merits should purport to establish and enforce rights accruing subsequent to the termination of the agreement, or if, although purporting to define and implement rights accruing under the contract although maturing thereafter, he should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award. The Supreme Court has clearly stated, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra* at 597:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance in many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an

(Footnote continued on following page)

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We may note that it is just because the Union seeks to arbitrate the existence and nature of rights which it claims "vested" during the term of the agreement, although maturing after the termination thereof, that arbitration here does not conflict with the rule above discussed, that a successor employer will not be required to continue to bargain with a union when there has been a substantial change in the nature of the employment enterprise. So too, it is because of this claim of "vested rights" that our order of arbitration does not conflict with decisions, whose validity we need not pass upon, barring "quasi-legislative" arbitration. See *Boston Printing Pressman's Union v. Potter Press*, D. Mass., 1956, 141 F. Supp. 553, affirmed, 1 Cir., 1957, 241 F. 2d 787, cert. denied, 355 U. S. 817; *Couch v. Prescolite Mfg. Corp.*, W. D. Ark., 1961, 191 F. Supp. 737; *In re Valencia Bart Express, Inc.*, D. P. R., 1961, 199 F. Supp. 103.

A careful scrutiny of the agreement discloses, we think, a perfectly clear intention that the questions propounded by the Union be arbitrated. A distinction is made, on the very face of the agreement, between ordinary grievances personal to individual employees, on the one hand, and other, perhaps more important disputes, such as the one before us, relative to "matters affecting the entire bar-

(Footnote continued from preceding page)

infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Appealing as it is, we cannot yield to the suggestion that we should now enunciate those standards which should guide the arbitrator in his determination of the existence, nature and remedy for implementing any employee rights accruing under and surviving the expiration of the collective bargaining agreement, so that he will know definitely whether any award he may make will "draw its essence from the collective bargaining agreement." To do this would be to intrude in a domain not ours and to invert the whole order of procedure in this delicate field of labor relations.

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gaining unit," both of which, however, are subjected to arbitration. Read as a whole the agreement clearly contemplates the arbitration of any "difference" or "dispute" between the Union and the employer "arising out of or relating to this agreement, or its interpretation or application, or enforcement." Arbitration is not limited to "grievances." This language, quoted from Section 16.0 of Article VI, relating to "Grievances: Adjustments of Disputes: Arbitration," is plainly intended to be broad and comprehensive. And we must remember the teaching of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 564-5, that the dispute is to be arbitrated unless it is perfectly clear that it is specifically and plainly excluded. The party claiming exclusion has a heavy burden. See *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 2 Cir., 1962, 298 F. 2d 644.

The exclusion clause relied upon here is Section 16.5(3) referring to "matters not covered by this agreement." Wiley would have us hold that, because the agreement does not mention the possibility of consolidation, the "matter" in suit is not covered by the agreement. This is pure sophistry. This suit involves the Union's claim of rights to pension plan, seniority, vacation and severance pay and other matters that are covered by specific provisions of the agreement, and even if such claim is wrong or even untenable and frivolous, this does not bar arbitration. *United Steelworkers of America v. American Mfg. Co.*, *supra* at 568-9. Moreover, the various specific references to matters reserved for the sole control of the employer and resting in his discretion, contained elsewhere in the agreement, merely emphasize the fact that no such specific exclusionary clauses make reference to any privilege on the part of the employer to consolidate with another company and cut off rights allegedly "vested" in the employees, such as the right to payments to the welfare fund,

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to vacations, and to seniority. It is not probable that the Union would have agreed to any such exclusionary clause had the subject come up for discussion.

A further argument in support of the interpretation of the agreement given above is that as arbitration is described as "the sole and exclusive" remedy of the parties and the employees, "in lieu of any and all remedies, forums at law, in equity or otherwise," "for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement" (Section 16.9), it is not reasonable to suppose that it was intended that the Union should have no right whatever to resort to arbitration in the event of a consolidation, but should be entirely at the mercy of the employer.

III

While the Supreme Court has clearly held that the question of "substantive arbitrability" is for the court (*Atkinson v. Sinclair Refining Co.*, *supra* at 241), it has never expressly decided the question as to "procedural arbitrability," namely, whether or not adherence or lack of adherence to the grievance and arbitration procedure outlined in a collective bargaining agreement is for decision by the court or by the arbitrator. Nor do we discern such a ruling by implication in the fact, adverted to by Wiley, that one week after deciding the *Steelworkers* cases the Court denied certiorari in *Brass & Copper Workers v. American Brass Co.*, 7 Cir., 1959, 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845, a case in which the Seventh Circuit had held that the question is for the court. So far as other authority is concerned, this Circuit has never spoken clearly on the issue, and there appears to be a difference of opinion on this point in the other Circuits, with more recent

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decisions holding that the question is for the arbitrator.* The lower federal courts seem also to be split,⁷ and the commentators in general agree that the matter is for the arbitrator.⁸

This question of "procedural arbitrability" is squarely before us now. By way of preliminary we must, we think, take note of the fact that "substantive arbitrability" and "procedural arbitrability" are separate and distinct mat-

* *Boston Mutual Life Insurance Co. v. Insurance Agents International*, 1 Cir., 1958, 258 F. 2d 516 (court function); *Brass & Copper Workers v. American Brass Co.*, *supra* (court function); *Radio Corp. of America v. Association of Professional Engineering Personnel*, 3 Cir., 1961, 291 F. 2d 105 (arbitrator function); *International Association of Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238 (citing cases which hold that it is the arbitrator's function).

⁷ Arbitrator's function: *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, E. D. Pa., 1960, 187 F. Supp. 97; *Local 971, United Automobile Workers AFL-CIO v. Bendix-Westinghouse Automotive Brake Co.*, N. D. Ohio, 1960, 188 F. Supp. 842; *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, W. D. Pa., 1959, 188 F. Supp. 225, affirmed, 3 Cir., 1960, 283 F. 2d 93; *United Cement Workers International Union, AFL-CIO v. Allentown-Portland Cement Co.*, E. D. Pa., 1958, 163 F. Supp. 816; *Insurance Agents International Union, AFL v. Prudential Ins. Co.*, E. D. Pa., 1954, 122 F. Supp. 869 (purporting to apply state law).

Court function: *Truck Drivers v. Grosshans & Petersen*, D. Kan., 1962, 51 L. R. R. M. 2116; *General Tire & Rubber Co. v. Local 512, United Rubber Workers of America, AFL-CIO*, D. R. I., 1961, 191 F. Supp. 911, affirmed, 1 Cir., 1961, 294 F. 2d 957; *United Brick & Clay Workers v. Gladding, McBean & Co.*, S. D. Calif., 1961, 192 F. Supp. 64; *Brass & Copper Workers Co. v. American Brass Co.*, E. D. Wis., 1959, 172 F. Supp. 465, affirmed, 7 Cir., 272 F. 2d 849, cert. denied, 1960, 363 U. S. 845; *International Union of Operating Engineers v. Monsanto Chemical Co.*, W. D. Ark., 1958, 164 F. Supp. 406.

* Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959); *Procedural Requirements of a Grievance Arbitration Clause: Another Question of Arbitrability*, 70 Yale L. J. 611 (1961). Contra: 28 Univ. Chi. L. Rev., *supra* at 732.

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ters. The Supreme Court has explained the rule that "substantive arbitrability" is for the court in the following terms:

"The Congress . . . has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to arbitrate."

United Steelworkers of America v. Warrior & Gulf Co., *supra* at 582; *Atkinson v. Sinclair Refining Co.*, *supra*, at 241. However, as Professor Cox has correctly noted in his article in 72 Harvard Law Review, *supra* at 1511, "the reason for giving the court power to decide what subject matter is within the arbitration clause does not extend" to the issue of "procedural arbitrability", for the court's duty to determine "whether the reluctant party has breached his promise to arbitrate" is exhausted once it has been determined that "the party seeking arbitration is making a claim which on its face is governed by the contract" or that "the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers of America v. American Mfg. Co.*, *supra* at 568; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra* at 582. See *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, E. D. Pa., 1960, 187 F. Supp. 97, 100.

Thus the settled law on the issue of "substantive arbitrability" does not control the decision of the separate problem now under discussion, and we think there is ample reason for holding that issues of compliance with grievance and arbitration procedure in the ordinary collective bar-

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gaining agreement are properly within the competence of the arbitrator. We find wholly unpersuasive the argument that questions of procedure in collective bargaining agreements involve "largely a matter of contract construction" as to which "the industrial context is irrelevant" and that consequently "the courts' expertise in construing agreements seems to qualify them as the appropriate forum for determining procedural compliance." 28 Univ. Chi. L. Rev., *supra* at 732. Rather we believe that a holding that this Court or any court should decide the merits of a dispute concerning procedural questions under an arbitration clause of a collective bargaining agreement would be quite inconsistent with the principles and policies enunciated by the Supreme Court to the effect that once it has been determined that the reluctant party has breached his promise to arbitrate, the matter must go to the arbitrator for determination on the merits. *United Steelworkers of America v. American Mfg. Co.*, *supra* at 568; *United Steelworkers of America v. Warrior & Gulf Co.*, *supra* at 581-2; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, *supra* at 596.

What is fundamental to the teaching of these cases, as we read them, is the ruling that the parties have bargained for a decision by an arbitrator because they thus have the benefit of his creativity and expertise that are in no small measure due to his knowledge of and familiarity with the industry and shop practices constituting the environment in which the terms of the collective bargaining agreement were negotiated and assented to. Surely, and especially under the conditions of the industrial world of today, this environment, and the concrete day-by-day relationships to which the agreement must be applied, includes the implementation of the arbitration clause and its procedural aspects. See *Procedural Requirements of*

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a Grievance Arbitration Clause: Another Question of Arbitrability, 70 Yale L. J. 611, 618 (1961); Cox, *supra* at 1509-12; Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 646-9 (1959). Cf. Fleming, *Problems of Procedural Regularity in Labor Arbitration*, 1961 Wash. U. L. Q. 221. Indeed, it may well be that the arbitrator can make his most important contribution to industrial peace by a fair, impartial and well-informed decision of these very procedural matters. To hold matters of procedure to be beyond the competence of the arbitrator to decide, would, we think, rob the parties of the advantages they have bargained for, that is to say, the determination of the issues between them by an arbitrator and not by a court. A contrary decision would emasculate the arbitration provisions of the contract.

The position just above outlined seems to us to be the only sound position to take especially when we consider what are the particular procedural questions involved in this case. Accordingly, we shall summarize, as briefly as we can, the miscellaneous contentions of Wiley that are supposed to fall in the category of procedure and the way these contentions are dealt with by the Union. Thus Wiley claims the Union was required to follow Steps 1, 2 and 3, described in Section 16.0. The Union replies that these applied only to an "affected employee," and not to the controversy in this case which affects the entire bargaining unit. The Union also points to the fact that there was an orderly exchange of views, and says this surely was a substantial compliance with the contract. Cf. *International Association of Machinists v. Hayes Corp.*, 5 Cir., 1961, 296 F. 2d 238. With respect to Wiley's claim that there was a failure to comply with the requirement of Section 16.6 that "any grievance must be filed with the Employer and with the Union Shop Steward within four (4) days after its

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occurrence or latest existence," the Union replies that the question here is not a "grievance" but a "dispute" or "difference" arising out of the agreement and that this Section has no application to a dispute over such a broad question as to whether all the employees had "vested" rights under the contract inextinguishable by unilateral action by the employer; and that to say this is a "grievance" to be filed "with the Employer and with the Union Shop Steward" borders on absurdity. Moreover, the Union contends that, if some sort of notice of the dispute was required within four weeks after its "occurrence or latest existence," the letter of June 27, 1961, filed within four weeks after the Union learned of the proposed consolidation, was such notice. It is further argued by the Union that the dispute was plainly a continuing one. But the Union adds that even if all its contentions as above stated were to be rejected, there was a clear waiver of procedural requirements by Wiley.

Is it to be supposed that the benefits of arbitration, duly bargained for, are to be indefinitely postponed, just because one of the parties tenders a miscellany of such contentions as these, and argues that no arbitration can be had until after a court has rejected them and they have also been passed upon by this Court?

It is of the essence of arbitration that it be speedy and that the source of friction between the parties be promptly eliminated. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 2 Cir., 1959, 271 F. 2d 402, 410, cert. granted, 1960, 362 U. S. 909, dismissed per stipulation, 364 U. S. 801. The numerous cases involving a great variety of procedural niceties already cited in the footnotes to this opinion make it abundantly clear that, were we to decide that procedural questions under an arbitration clause of a collective bargaining agreement are for the court, we would open the door wide to all sorts of technical obstructionism.

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This would be completely at odds with the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters Union v. Lucas Flour Co.*, *supra* at 105. See *In the Matter of Jacobson*, D. Mass., 1958, 161 F. Supp. 222, 227 (opinion by Wyzanski, J.), reversed and remanded *sub nom.*, *Boston Mutual Life Ins. Co. v. Insurance Agents Union*, *supra*. Cf. *Proctor & Gamble-Independent Union v. Proctor & Gamble Mfg. Co.*, *supra* at 645.

It is for this reason that we cannot agree to the distinction propounded by Judge Palmieri in his very excellent discussion in *Carey v. General Electric Co.*, S. D. N. Y., 1962, 50 L. R. R. M. 2119, 45 CCH Lab. Cas. Par. 17,599, between matters of procedural compliance requiring the expertise of the arbitrator for decision and those which the courts are capable of deciding on their own. If the court must first decide whether a particular procedural problem calls for the special abilities and knowledge of an arbitrator, there will be inevitable delay. Such a practice, if followed, would develop a whole new body of decisional law, with the usual distinctions and refinements. Moreover, we have serious doubts that the suggested distinction between different types of procedural questions arising out of the arbitration clauses in collective bargaining agreements can be placed upon any tenable and rational basis. In any event, it is clear that the practical consequences of attempts by the courts to apply such a distinction would be delay and prejudice to the speedy and effective arbitration which we believe the national policy calls for.

Having thus decided that the question of "procedural arbitrability" is for the arbitrator, we do not reach the merits of Wiley's contentions that the Union did not comply with the procedural requirements of the collective bargaining agreement.

Reversed with a direction to order arbitration.

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**ARTICLE XVI: GRIEVANCES: ADJUSTMENTS OF
DISPUTES: ARBITRATION.**

Sec. 16.0. Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as "grievance":

Step 1: The grievance, when it first arises, shall be the subject of a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person in charge of his department. The grievance shall be presented orally. If, at this step, the grievance is resolved to the mutual satisfaction of the parties, a memorandum stating the substance of the settlement shall be prepared and signed by the Employer representative and the affected employee. Copies of the same shall be furnished to the Union's Shop Steward and the Employer. In the event that the grievance is not satisfactorily settled within two (2) working days after the conclusion of the conference stated above, the grievance shall be reduced to writing. It shall state the nature of the claim made and the objections raised thereto and shall be signed by the Employer representative and the affected employee.

Step 2: Within five (5) working days thereafter, the grievance shall be the subject of a conference between an officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union, at which conference the parties will endeavor to resolve and settle the grievance.

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Step 3: In the event that the grievance shall not have been resolved or settled in "Step 2", the grievance shall be referred and submitted to arbitration before an impartial arbitrator who shall be chosen by the mutual consent in writing by the Employer and the Union. All grievances not satisfactorily adjusted within two (2) weeks from their inception shall be referred to arbitration, unless such time shall be extended in writing by Employer and the Union.

Sec. 16.1. In the event that the parties fail to agree upon an impartial arbitrator, as provided in "Step 3", the impartial arbitrator, by the filing of a demand for arbitration by the aggrieved party, shall be selected and designated by the American Arbitration Association, pursuant to whose Rules for its Voluntary Labor Arbitration Tribunal, any and all arbitrations shall be conducted.

Sec. 16.2. The arbitrator finally designated to serve in that capacity, after receiving a written statement signed jointly by the Employer and the Union certifying to his selection and designation as aforesaid and containing a concise statement of the issue involved, shall conduct the arbitration in accordance with the Arbitration Law of the State of New York. The decision of the Arbitrator shall be final and binding upon the parties. All expenses incidental to the arbitrator's services, if any, shall be borne equally by the Employer and the Union.

Sec. 16.3. It is agreed that time is of the essence in any arbitration, and both parties will exert their best efforts to obtain a speedy decision.

Sec. 16.4. It is expressly agreed that there shall be no strike, slow-downs or suspension of work of any nature while a grievance is in the process of negotiation and disposition under the grievance and arbitration procedures of this Article.

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Sec. 16.5. It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

- (1) the amendment or modification of the terms and provisions of this agreement;
- (2) salary or minimum wage rates as set forth herein;
- (3) matters not covered by this agreement; and
- (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement.

Sec. 16.6. The status in effect prior to the assertion of a grievance or the existence of any controversy or dispute shall be maintained pending a settlement or decision thereof. Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance.

Sec. 16.7. Nothing contained in this Article shall be deemed to be a restriction or limitation of the rights of the Employer, or the Union, or an individual employee, or a group of employees, as specified in Section 9(a) of the Labor Management Relations Act, 1947, as amended. However, whenever any meetings or conferences are held with the Employer during business hours, the Union's employee-representatives shall be limited to only two (2) employees. During negotiations for the renewal of this agreement, the Union's negotiating committee shall be

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limited to no more than three (3) employees. Except in emergency situations, employees shall not discuss grievances with Stewards during regular working hours.

Sec. 16.8. Grievances or disputes arising out of this agreement shall not be combined or accumulated and submitted as a part of one case or arbitration proceeding. Accordingly, no arbitrator shall have the authority to hear or determine more than one (1) grievance, unless several grievances arise out of the same common state of facts, and are relevant and germane to one another. Whenever any provision in this agreement reserves to the Employer the right to exercise its sole discretion or judgment with respect to specific subjects, events, matters or situations, the exercise or non-exercise of such discretion or judgment shall not be arbitrable.

Sec. 13.9. Except for threatened breaches or actual breaches of the provisions of Article "25" of this agreement ["Strikes and Lockouts"] the arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. The waiver of all other remedies and forums herein set forth shall apply to the parties hereto, and to all of the employees covered by this contract. No individual employee may initiate an arbitration proceeding.

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for the Second Circuit.*

KAUFMAN, Circuit Judge, concurring:

In view of the extraordinarily complex problems raised in the case before us, all of which have been thoroughly and persuasively dealt with in the opinion of Judge Medina and so many of which will have broad ramifications in the growing and yet unshaped field of federal labor law, I deem it my responsibility to clarify what I interpret to be the holding of the court today. We hold that the collective bargaining agreement between Interscience and the Union does not clearly remove from the scope of arbitration the following question: (1) Whether the collective bargaining agreement as a whole survived the consolidation of Interscience and Wiley; (2) If the agreement did survive the consolidation—thereby imposing upon Wiley an obligation to arbitrate at the behest of the Union disputes arising before its natural termination on January 31, 1962—whether the Union had to comport with the three-step grievance procedure, and if so, whether it did in fact comport with it or was relieved from doing so; and (3) Whether certain Union and employee rights became “vested” under the terms of the agreement.

Although the collective bargaining agreement contains no express provision making its obligations binding upon the successors of the parties, our decision today, in effect, permits the arbitrator to “imply” such a provision into the agreement if, under the circumstances present here such an implication is proper. In doing so, he will no doubt make an effort to extrapolate the probable intentions and expectations of the parties, to evaluate the change in the nature and scope of the employment unit and employer-employee relationships, the disruptive potential of implying such a clause, and other relevant factors. It is this power to read a successor clause into the collective agreement which makes Wiley a proper party defendant in the

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case before us. What we decide here is that since the arbitrator may find that the agreement was intended to bind successors, and that since Wiley is the successor of Interscience, then Wiley is a potential party to a binding arbitration decree. Our mere refusal to determine that Wiley is not a proper party defendant in this judicial proceeding does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the obligation to arbitrate or the obligation to respect the allegedly “vested” rights of the employees. So too, the Union is a proper party plaintiff, even though the arbitrator may ultimately determine that, because the collective bargaining agreement was not intended to survive consolidation, the Union cannot compel arbitration.

With this interpretation of the court’s holding in mind, I enthusiastically register my concurrence.

**Judgment of the United States Court of Appeals
for the Second Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the eleventh day
of January one thousand nine hundred and sixty three.
Present:

HON. HAROLD MEDINA,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

DAVID LIVINGSTON, as President of District 65,
R,W,D,S,U, AFL-CIO,
Plaintiff-Appellant,

v.

JOHN WILEY & SONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the [sic] of said District Court be and it hereby is reversed with a direction to order arbitration in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO
Clerk

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, as President of District 65, Retail,
Wholesale and Department Store Union, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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EUGENE G. EISNER,
WEISMAN, ALLAN, SPETT & SHIMBERG.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

JOHN WILEY & SONS, INC.,

Petitioner,

against

**DAVID LIVINGSTON, as President of District 65, Retail,
Wholesale and Department Store Union, AFL-CIO,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions of the Court below (Pet. App. A-9, A-35) are reported at 313 F. 2d 52. The opinion of the District Court (Pet. App. A-1) is reported at 203 F. Supp. 171.

Jurisdiction

The judgment of the Court below was entered on January 11, 1963 (Pet. App. A-37). Petition for rehearing was denied on February 5, 1963 (p. 162a of certified record). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

Whether it was within the power of the United States Court of Appeals for the Second Circuit to direct that the petitioner should submit to arbitration as to what rights survived to the members of the respondent Union after a consolidation by petitioner with Interscience Publishers, Inc., the latter corporation having been in collective bargaining relationship with the respondent. A subsidiary question is whether the lower Court had the power to direct the arbitrator to determine whether the respondent had complied with the grievance machinery of the collective bargaining agreement.

Reason for Denying the Writ

We rest largely on the opinions of the Court below which clearly and most learnedly set forth the nature of the problem, the issues involved and the state of the law, including the divergence of opinions between the various Circuits (Pet. App. A-9, A-35).

As was quoted in the very latest Court case on the subject:

"It has been authoritatively decided that in suits under section 301 to compel arbitration the function of the courts is narrowly limited to determining 'whether the reluctant party did agree to arbitrate the grievance' An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steel Workers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574, 582-583 (1960)";

Textile Workers' Union v. Newberry Mills, ———
F. 2d ———, 52 LRRM 2650 (4th Cir. 1963).

This Court has clearly spoken on many occasions on this question, and has been understood by the Courts, as exemplified by the Court's opinions in the case at bar and by the opinion of Chief Judge Sobeloff in the *Newberry Mills* case, *supra*. This Court has already sufficiently delineated the respective roles of arbitrators and the Courts in the arbitration of labor disputes, and while there may be some differences as to procedural aspects, there is substantial accord on the fundamental principles and there is no need for the further involvement of this Court. See, *Analysis* BNA Labor Relations Reporter Vol. 52 #23, 52 *Analysis* 45.

In *Local 748 I. U. E. v. Jefferson City Cabinet Co.*, — F. —, 52 LRRM 2513 (8th Cir. 1963), the Court, by Circuit Judge Miller, followed Judge Medina's views, as expressed in the case at bar. Judge Miller, too, had no difficulty in construing this Court's opinion in the *Steel Workers* cases, 363 U. S. 564; 363 U. S. 574; 363 U. S. 593 (1960), and the *Drake Bakeries Inc. v. Local 50* case, 370 U. S. 254 (1962).

Nor did Judge Rives have any difficulty with this Court's opinions, for in *Deaton Truck Line v. Local 612 Teamsters*, — F. 2d —, 51 LRRM 2552 (5th Cir. 1962), he held that the question of compliance with the grievance and arbitration procedure of a collective bargaining agreement was for the arbitrator, relying again on this Court's views as expressed in the *Steel Workers* cases. See also, *Greater Kansas City Laborers v. Builders Association*, 213 F. Supp. 429 (W. D. Mo. 1963); *Brewery Workers v. Bevington and Basile*, 213 F. Supp. 437 (W. D. Mo. 1963); *United Furniture Workers v. Mohawk Corp.*, 212 F. Supp. 933 (M. D. Pa. 1963); *Carey v. General Electric Co.*, — F. 2d —, 52 LRRM 2662 (2d Cir. 1963).

The case at bar was reconsidered by the Court below on a petition for rehearing with the request that the matter be considered *en banc* and the petition was denied. Just

recently, the same Court, in the *Curry v. General Electric* case, *supra*, by Judges Friendly, Kaufman and Marshall reaffirmed the Court's decision below. Thus, five of the judges of that illustrious Court have studied this Court's pronouncements and have made decisions thereon without dissent.

As this Court said in *Steel Workers v. American Manufacturing Co.*, 363 U. S. 564, 566-567:

"Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. 173(d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement * * *.' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

"* * * The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all disputes that arise under the agreement.*" (Emphasis supplied.)

Each Circuit certainly should be allowed some latitude in determining procedure, particularly in arbitrations where flexible remedies have been mandated by this Court. Surely, the fact that one Circuit prefers giving more latitude to the arbitrator should not be a cause for concern by the highest Court in the land.

It must be remembered above all that the decision below does not involve anything of supreme importance so far as substantive law is concerned. The decision deals largely, if not exclusively, with procedural problems and directs the parties to proceed to arbitration and leaves it to the arbitrator to deal with the substantive problems in accordance with the directions of this court in *Warrior & Gulf, supra*, and *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957).

As was stated by one eminent authority in the field of labor relations:

"Less harm is done by sending an apparently weak case to arbitration than by denying the moving party the opportunity to be heard in the forum having the primary responsibility for determining the issue."

Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 265 (1958).

As far as petitioner's claim that the decision of the Court below is in conflict with decisions of the 4th and 6th Circuit Courts of Appeal relating to the issue of enforcement of a collective bargaining agreement after its termination (Pet. 15-16), the Court below quite ably distinguished the case at bar from the 4th and 6th Circuit cases (Pet. App. A-18, 19) and we rest on the learned Court's distinction.

Insofar as petitioner's claim of mootness is concerned, a careful perusal of the issues sought to be arbitrated clearly indicate that the issues are not moot. Surely, the rights of the employees to vacation pay, severance pay, seniority, grievance procedures and to health and welfare payments are very much alive. See, footnote 4, opinion below (Pet. App. A-20). This Court, in at least two cases, recently denied certiorari on much more important issues involving similar vested rights. *Zdanok v. Glidden*, 288 F. 2d 99 (2nd Cir. 1961), aff'd other grounds, 370 U. S. 530, rehearing denied, 371 U. S. 854 (1963); *Oddie v. Ross Gear and Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), cert. denied, 83 S. Ct. 318 (1962). However, if this Court finds, as petitioner claims, that all of the issues tendered for arbitration, with one exception, are moot, then there is less compelling reason for this Court to review the decision of the Court below.

Conclusion

In conclusion, while the petitioner seeks to make this "an extraordinary complex case," in essence, the issues are not so difficult as to justify this Court's intervention. As set forth above, the question is, should arbitration be had as to whether rights of employees accruing under successive collective bargaining agreements are absolutely cut off by a corporate consolidation pursuant to a New York statute which provides that liability on all contracts shall continue under such consolidation, and as to whether there was compliance with the grievance machinery.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1962 ³

DOCKET No. ⁹¹

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL,
WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

DOCKET No. 934

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL,
WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

We respectfully draw the Court's attention to the decision just published of the United States Court of Appeals for the Sixth Circuit, in *Local Union 998, U.A.W. v. B & T Metals Company*, — F. 2d —, 47 CCH Lab. Cas. ¶ 18,191 (filed April 5, 1963). The decision is of particular interest not only because it supports petitioner's contention that under the pertinent decisions of this Court the issue of whether Wiley is contractually obligated to arbitrate must be determined by the court and not the arbitrator (Second Reason for Allowance of Writ (p. 9) and subheading "Substantive Arbitrability" under Point 2 of Argument (pp. 12 and 13)), but also because it establishes a clear conflict in principle on this point with the decision of the Second Circuit in the case at bar.

In the cited case, the issue for determination was whether the contract was in existence when the grievances which the Union sought to arbitrate arose. The District Court directed the arbitrator to determine the issue.

The Court of Appeals reversed.* It held that the basic question of arbitrability, that is, whether there was a subsisting agreement requiring arbitration, must be determined by the court and not by the arbitrator.

In the case at bar, the basic threshold issue is whether Wiley was obligated under Inter-science's contract with the Union to arbitrate the asserted grievances. The Court of Appeals refused to pass on the issue and directed that it be determined by the arbitrator.

The majority opinion requires Wiley to proceed to arbitration to determine "whether the obligation to arbitrate . . . survived the consolidation" (p. A-17, Appendix). Judge Kaufman, concurring in order to "clarify" the holding of the court stated that "although the collective bargaining agreement contains no express provision making its obligations binding upon the successors of the parties, our decision today, in effect, permits the arbitrator to 'imply' such a provision into the agreement if, under the circumstances present here such an implication is proper" (p. A-35, Appendix). See page 8 of Petition.

We think words cannot more clearly express a direction to the arbitrator to determine the issue of whether or not Wiley is contractually bound to arbitrate. We submit that this is not only in direct conflict with the decision of the

*The Court of Appeals assumed, as contended by the union, that the factual issue was not resolved by the District Judge and that his ruling was based on the conclusion that, as a matter of law, the issue was to be determined by the arbitrator and not by the Court.

Sixth Circuit, but is also squarely contrary to the rule laid down by this court in the *Steelworkers* cases and in *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241 (1962).*

Respectfully submitted,

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* Note that a related but distinct question upon which certiorari is also sought and as to which the Circuits have so sharply divided is whether so-called "procedural arbitrability" is within the rule of *Atkinson v. Sinclair Refining Co.* that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court." (First Reason for Allowance of Writ (p. 9) and Point 1 (pp. 10-12) and subheading "Procedural Arbitrability" under Point 2 (p. 13) of Argument.)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

DOCKET No. 91

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65,
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UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Respondent.

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 88) is reported at 313 F. 2d 52 and of the United States District Court (R. 51) at 203 F. Supp. 171.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1963 (R. 112). The petition for certiorari was filed March 15, 1963, and was granted May 13, 1963 (373 U. S. 908; R. 118). The jurisdiction of this Court rests on 62 Stat. 928; Title 28, U.S.C. § 1254 (1).

Questions Presented

(1) Where a company having a collective bargaining agreement with a union merges into a larger non-unionized company and the merged company's employees are integrated with the employees of the surviving company into a single unit not represented by the union, is the court or the arbitrator to determine whether the surviving company is contractually obligated under the collective bargaining agreement to arbitrate questions relating to the terms and conditions of employment with the surviving company?

(2) Absent a provision in the collective bargaining agreement binding successors, or an agreement by the surviving company to assume the contract, must the surviving company arbitrate the union's claim that service under the predecessor's collective bargaining agreement created such "vested" or "property" rights in the employees that the surviving company will be required for an indefinite period after the expiration of the agreement:

(a) to continue to accord to such employees seniority, job security, vacation and severance pay, and coverage under the Union Welfare Plans,

(b) to remain bound under the grievance provisions of the expired agreement to arbitrate disputes arising after the expiration of the agreement?

(3) Is the union the proper party to assert post-contract rights on behalf of the employees who are now a part of another bargaining unit which is not represented by the union?

(4) Is the court or the arbitrator to determine whether there are conditions precedent to the contractual obligation to arbitrate, and if so, whether the union has complied with them?

Statutes Involved

Labor Management Relations Act, 1947, § 301(a), 61 Stat. 156, 29 U.S.C. § 185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

New York Stock Corporation Law §90; 58 McKinney's Consolidated Laws of New York § 90:

"Rights of creditors of consolidated corporations.
The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consoli-

dation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending."

Statement

The Proceedings

This suit was brought by the respondent (the "Union") on January 23, 1962 in the United States District Court, Southern District of New York, to compel petitioner ("Wiley") to arbitrate issues relating to a collective bargaining agreement made by the Union with Interscience Publishers, Inc. ("Interscience"), which four months prior to suit had been merged into Wiley (R. 3-42).

The District Court had jurisdiction of the suit under Sec. 301(a) of the Labor Management Relations Act.¹

¹ The complaint alleges jurisdiction under Sec. 301(a) of the Labor Management Relations Act, and under the U. S. Arbitration Act, Title 9, U.S.C. (R. 3). It was filed on January 23, 1962 (R. 3); the order to show cause, with petition seeking the identical relief annexed thereto was signed on January 24, 1962 (R. 43); service of the petition and order to show cause was accepted on January 25, 1962, and service of the complaint was made on January 29, 1962 (R. 73; the docket entry [R. 2] erroneously indicates that the complaint was served on January 23). The time to file an answer to the complaint has been extended by stipulation until the entry of a final order on the petition (R. 73). The case was argued on the petition, complaint and affidavits; there has been no trial. Wiley objected to the proceedings in the District Court on the ground that there was no jurisdiction under the United States Arbitration Act and therefore no justification for the summary proceedings adopted by the Union (R. 74). Although the Union subsequently characterized the proceedings as "in the nature of a motion for summary judgment", Rule 56(a) of the Federal Rules of Civil Procedure does not permit such a motion to be made prior to 20 days after service of the summons and complaint. The District Court did not decide whether it had jurisdiction under the Arbitration Act or rule directly on the propriety of the Union's procedure. The Court of Appeals merely held that the District Court had jurisdiction under Section 301 of the Labor Management Relations Act (R. 89).

The District Court denied the petition. The Court of Appeals reversed and directed arbitration in accordance with its opinion.

The Facts

Wiley and Interscience, theretofore unrelated scientific publishers, had merged for bona fide business reasons on October 2, 1961 (R. 77), four months prior to suit. Interscience, whose corporate existence was terminated by the merger (R. 77), had signed a series of collective bargaining agreements with the Union, the last of which, dated February 1, 1960, upon which the Union sues, was to expire by its terms on January 31, 1962, one week after commencement of suit (R. 4, 34, 76-77).

On October 2, 1961, the date of the merger, Interscience had eighty employees, forty of whom, clerks, stenographers, and bookkeepers, were covered by the collective bargaining agreement (R. 77). It had an office in New York City and annual sales of \$1,000,000 (R. 4, 77). Wiley, the surviving company, was older, having been established in 1807, had three hundred employees, a much larger office in New York City and separate warehouse facilities in that city, an office and warehouse in Salt Lake City, and annual sales of \$9,000,000 (R. 4, 77). No Wiley employees are or have been represented by a union and there is no established Wiley policy with respect to "seniority rights", "job security", "grievance procedures", or "severance pay", as those terms are used in the Union's complaint and petition (R. 77):

Following the merger, the Interscience employees were integrated into Wiley's operations, and thereafter no longer constituted a separate or distinct bargaining unit (R. 58). Neither prior to nor at any time since the merger has the Union had a collective bargaining relationship with Wiley (R. 32), nor has it claimed to represent a majority

of the Wiley employees or a majority of any appropriate collective bargaining unit in the Wiley establishment.*

The proposed merger was publicly announced in late May, or early June, 1961 (R. 57, 77). On June 27, 1961, the Union notified Interscience that "under the agreement between the parties, our employees are entitled to continue working, notwithstanding such joinder", that they should not be "terminated from employment", and that "any impairment" of their rights would be resisted "to the fullest possible extent under the law" (R. 57-58, 77). On the same day, the Company told the Union that it should feel free to discuss the merger with it at any time (R. 77-78).

On September 19, 1961, Interscience's counsel met with Union counsel and Union representatives. He told them that the merger would become effective on October 2, 1961, that at that time the Interscience bargaining unit would be merged into and be absorbed by the larger Wiley unit and that from and after that date the Union no longer would be recognized as the bargaining agent for those employees (R. 58-59, 78).

The Union took the view that it should continue to represent the employees after the merger, and until the expiration of the contract on the following January 31. Interscience replied that Wiley would not recognize the Union unless ordered to do so by the National Labor Relations Board, and cooperation was offered if the Union should desire to petition it for an election (R. 58).

Specifically, Interscience (on behalf of itself and Wiley) took the following position at that meeting:

* The Union in this action has claimed the right to represent the former Interscience Union employees, at least for the purpose of enforcing their alleged rights under the collective bargaining agreement between the Union and Interscience, even though they no longer constitute by themselves an appropriate collective bargaining unit.

1. That the 40 Interscience employees then represented by the Union on October 2, 1961 would become Wiley employees and members of a larger bargaining unit not represented by the Union (R. 58-59).

2. That from and after October 2, 1961 Wiley would regard the Interscience union contract as ineffective, and would not recognize the Union as the bargaining agent for the former Interscience employees (R. 59).

3. That from and after October 2, 1961, no further contributions would be made to the Union Welfare and Pension Plans except to make final settlement for Interscience's liability accrued to September 30, 1961 (R. 59).

4. That as of October 2, 1961 the Interscience employees would enter the Wiley Employee Retirement Plan with full credit for past service with Interscience (R. 59).

5. That severance payments would be voluntarily made to Interscience employees for whom Wiley could not provide jobs (R. 59).

Another meeting was held on September 26, 1961 when the Union suggested, and Interscience (on behalf of Wiley) tentatively agreed, that severance payments in excess of the contract formula would be made not only to those employees whose jobs might be lost as a result of the merger but to those who might not wish to work for Wiley (R. 60).

On September 28, 1961, the Union advised Interscience that the proposed severance payment arrangement would be agreeable but insisted that the Interscience employees enter Wiley's employment with seniority rights. The Company refused. The Union said it would request advice from counsel (R. 60-61).

On the same day, Interscience sent the Union a registered letter stating:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. with Wiley remaining as the surviving corporation becomes effective on October 2, 1961 at 9:00 a.m. At that time our employees become Wiley employees and our collective bargaining agreement with you will no longer be effective except for the obligation to pay to the '65 Security Plan' the amount due for the quarter ended September 30, 1961. In due course the report for that period and the supplemental W-2 forms will be sent to you with payment for the difference between the amount shown to be due and the deposit which you are now holding for Interscience's account." (R. 78-79)

The merger was accomplished on October 2, 1961 as scheduled (R. 77). All Interscience employees on that date became Wiley employees. No one was laid off or discharged (R. 76). On that day, Wiley wrote the Union as follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. became effective at 9:00 a.m. today. You were recognized by Interscience Publishers, Inc. as the collective bargaining agent for its clerical and shipping employees. These employees are now Wiley employees and are a minority accretion to an identical unit of Wiley employees for which you are not the chosen collective bargaining agent.

For your information we enclose a copy of a letter which has this day been delivered to the former employees of Interscience Publishers, Inc., whom you represented before the merger." (R. 80)

The letter enclosed therewith follows:

"Dear Fellow Employee:

Until today, as an employee of Interscience Publishers, Inc. you were represented for collective bargaining purposes by District 65. By virtue of the merger between Interscience Publishers, Inc. and John Wiley & Sons, Inc. which took place today, Interscience has disappeared as a legal entity and Wiley remains as the surviving corporation. You are now a Wiley employee doing similar work as part of a larger group which is not represented by District 65. Effect therefore will not be given to the collective bargaining contract which existed between Interscience and District 65." (R. 79-80)

On October 9, 1961 final payment was made to the Union Welfare Plans with the following letter:

"Gentlemen:

We are enclosing our check in the amount of \$684.06 in payment of the following:

1. Amount due to the "65 Security Plan"
for the quarter ended September 30,
1961 \$4,184.06
2. Less: Deposit which you are now hold-
ing for Interscience's account 3,500.00

Check enclosed \$ 684.06

The supplemental W-2 forms will be sent to you shortly." (R. 81)

The check enclosed therewith was endorsed "Final Payment from July 1, 1961 to September 31, 1961" and was deposited on October 13, 1961 (R. 81).

The Wiley Employee Retirement Plan was formally amended on the date of the merger to provide for the

entry of the Interscience employees into the Plan with credit for their service with Interscience (R. 81). Wiley's cost of funding their past service was \$18,462 (R. 87).

Following the merger, four meetings were held between Wiley and the Union and their respective counsel, each without prejudice to Wiley's refusal to recognize the Union or the contract (R. 61, 64). The first took place in early November, a month after the merger (R. 61). In these talks, the Union insisted that it be recognized as the bargaining agent for the former Interscience employees during the remaining term of the contract, and that the employees' seniority be carried over to Wiley. Wiley was adamant in its refusal (R. 64). Notwithstanding its claim that it continued to represent the employees and that the contract remained effective until January 31, 1962, the Union made no effort to exercise its contract prerogatives relating to shop steward (Sec. 1.0; R. 11-12), hiring hall (Secs. 4.1-4.3; R. 14), bulletin board (Article XX; R. 32), Union visitation (Article XXIX; R. 36), and other Union rights (R. 82).

At the last of these meetings Wiley said that no employees would be dropped as a result of the merger (R. 61). Eleven employees have resigned and received severance payments voluntarily made by Wiley in exchange for general releases (R. 86-87). The remaining twenty-nine continue in Wiley's employ. None has asserted a grievance. None has raised any issue with Wiley about seniority, job security, grievance procedures, vacation pay, the adequacy of the Wiley Employee Retirement Plan or otherwise (R. 76).

The collective bargaining agreement contained the customary provision for automatic renewal unless notification was given by either party that changes in the agreement were desired (Article XXIV; R. 34). The Union gave such notification on November 24, 1961 and again on Decem-

ber 1, 1961, and the agreement expired by its terms on January 31, 1962 (R. 83-85).³

The grievance procedures prescribed by the agreement "were completely ignored" by the Union.⁴ The issues now sought to be arbitrated were not even discussed. The conversations before and after the merger related to rights during the remaining term of the contract (R. 64, 68). And even some of these, as asserted in the complaint, were not referred to, except by the catch-all phrase "other rights" (R. 64), although the Union says that employees unnamed raised them with it (R. 67).

No claim was ever made for post-contract rights, rights for the period after January 31, 1962; nor was any demand ever made for arbitration either of contract or post-contract rights (R. 82).

In its complaint and petition, the Union sought to compel Wiley to submit the following issues to arbitration:

"(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now *and after* January 30, 1962;⁵

"(b) Whether as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Se-

³ The Union does not contend that the Interscience agreement extended beyond January 31, 1962. Its contention is that certain rights "vested" prior to that date.

⁴ This was admitted by the Union in the Turbane affidavit (R. 68) and was expressly so found by the District Court (R. 54-55). The statement by Judge Medina in the Court of Appeals that "the upshot [of the conflicting positions adopted by the parties] was that the Union demanded arbitration of the dispute, under Article XVI of the Agreement" (R. 89), is not supported in the record and is incorrect. The only demand for arbitration made by the Union was in its complaint and petition.

⁵ The complaint erroneously refers to the expiration date as January 30, rather than January 31, 1962.

curity Plan and District 65 Security Plan Pension Fund now *and after* January 30, 1962;

"(c) Whether the job security and grievance provisions of the contract between the parties *shall continue* in full force and effect;

"(d) Whether the Company [Wiley] must obligate itself to continue liable now *and after* January 30, 1962 as to severance pay under the contract;

"(e) Whether the Company [Wiley] must obligate itself to continue liable now *and after* January 30, 1962 for vacation pay under the contract" (Emphasis supplied) (R. 10, 46-47).

With one exception, all of the issues relating to the contract period (expiring on January 31, 1962) are moot. What the Union seeks to arbitrate is its claim that Wiley should "commit itself" to the working conditions spelled out in the Interscience contract for an indefinite period *after* the expiration of the contract (R. 10).^{*}

The pertinent provisions of the collective bargaining agreement between the Union and Interscience are briefly summarized below:

The bargaining unit is defined as "all clerical and shipping employees" at Interscience's office (250 Fifth Avenue, New York City) "or at any branch office of said location hereafter opened by the Employer in the greater New York Area" (Article I; R. 11-12).

A seniority list of the regular employees is to be established and maintained. Promotions, layoffs and rehiring

^{*} See pages 34-40, *infra*. The exception is the Union's claim that Wiley is required to make a contribution to the District 65 Security Plan for the four months ending January 31, 1962.

are to be based generally on seniority (Article VI; R. 15-17). Seniority rights are lost after a lay-off of six months (Sec. 6.11(d); R. 17).

The Company is required to make quarterly payments to the "Sixty-five Security Plan" of nine percent of the total wages of the covered employees (Article XV; R. 24-27). A deposit equal to one quarterly payment was made at the inception of the agreement, to remain on deposit during its term, and was to "be returned to the Employer at the termination of this contract" (Sec. 15.1; R. 24-25). The employer's sole financial obligation under Article XV is payment of the contributions at the rate set forth (Sec. 15.4; R. 25).

The agreement reserves various rights to the sole discretion or judgment of the Employer and expressly excepts the exercise or non-exercise of such discretion or judgment from arbitration (Sec. 16.8; R. 30). In Section 6.10 the Employer reserves the sole right to determine the extent to which its establishments, in whole or in part, shall be operated or shut down (R. 17). In Section 7.2 the Employer reserves the sole and unqualified right to reduce the number of employees by discontinuance of certain lines of activities or business operations (R. 18). Section 18.0 reserves to the Employer all management rights, including the right to arrange and direct its entire working force; to determine the plan and manner of work, to decide the number and location of its establishments and the establishment, relocation, discontinuance or closing of existing departments (R. 31). In Section 18.2 the Union expressly recognizes that the organization of the Employer and the determination of the policies affecting the work assignments of its personnel are rights vested exclusively in the Employer (R. 32).

Article XVI provides for a grievance procedure culminating in a referral to arbitration (R. 27-30).

Section 16.0 provides that "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as 'grievance'" (R. 27).

Section 16.5 provides that "in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions * * * (3) matters not covered by this agreement; and (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement" shall not be subject to arbitration (R. 29).

The grievance (or the "difference" or "dispute"), when it arises, is to be the subject of a conference by the "affected employee", with a Union steward and the Employer. In the event the grievance is not satisfactorily settled within two working days of the conclusion of the conference, the grievance is to be reduced to writing and signed by the Employer and the "affected employee" (Sec. 16.0, step 1; R. 27). The notice of grievance reduced to writing pursuant to step 1 must be filed within four weeks of its occurrence or latest existence. Failure to file the grievance "within this time limitation" is to be deemed "an abandonment" (Section 16.6; R. 29).

Within five working days thereafter the grievance is to be subject to a further conference between the Employer and the Union shop committee (Sec. 16.0, step 2; R. 27-28).

Only in the event that the grievance is not resolved or settled in step 2 is it to be arbitrated, and the parties agree to attempt to choose a mutually agreeable arbitrator. Any grievance not satisfactorily adjusted within two weeks from the step 1 conference is to be referred to arbitration

unless the time is extended in writing (Sec. 16.0, step 3; R. 28).

In the event the parties fail to agree upon an impartial arbitrator the aggrieved party is to file a demand for arbitration with the American Arbitration Association (Sec. 16.1; R. 28).

Grievances can be grouped if rising out of a "common state of facts" (Sec. 16.8; R. 29-30).

Article XVII provides that the contract shall be enforceable "only in the manner established by this contract (R. 30-31).

Article XXX provides that the agreement contains "the whole agreement of the parties", and that "there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein" (Sec. 30.0; R. 36).

Decision of the District Court

The District Court assumed, for the purpose of its decision, that the agreement survived the consolidation and that Wiley was bound to observe its terms (R. 54). It held, however, that compliance with the grievance procedures prescribed in Article XVI, and in particular the filing of a notice of grievance within four weeks of its occurrence, was a "condition precedent" to the employer's obligation to arbitrate. Finding it "undisputed" that no notice of grievance was filed within the four-week period, and indeed, that all of the grievance procedures set forth in the agreement were "completely ignored", the Court held that the grievances had been abandoned (R. 54-56).

It also held that the issues tendered by the Union were not within the scope of the arbitration clause which, it said, were intended to apply only to individual grievances of an "affected employee", and not to "matters involving the entire collective bargaining unit" (R. 54-55).

Decision of the Court of Appeals

The Court of Appeals reversed and directed arbitration.

Judge Medina, writing for the Court, held that the "consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement"; but did not decide what those rights were or whether they continued beyond the contract period and could be asserted against Wiley (R. 93). The Court's holding on this branch of the case was expressly limited to the requirement that Wiley *arbitrate* whether the *obligation to arbitrate* survived the consolidation; and if it did, just what employee rights, if any, survived.

It said:

"We merely hold that, as we interpret the collective bargaining agreement before us * * *, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract.

* * * [W]e think and hold, in the exercise of our duty to fashion an appropriate rule of federal labor law, that it is not too much to expect and require that this employer [Wiley] proceed to arbitration with the representatives of the Union to determine whether the *obligation to arbitrate* regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation." (Emphasis added) (R. 94-95)

¹ This thought was also expressed by the language that "the agreement and rights arising therefrom were *not necessarily* terminated by the consolidation". (Emphasis added) (R. 90)

Judge Kaufman, concurring, explained this aspect of the decision in this language:

"Although the collective bargaining agreement contains no express provision making its obligations binding upon the successors of the parties; our decision today, in effect, permits the arbitrator to 'imply' such a provision into the agreement if, under the circumstances present here such an implication is proper. . . . What we decide here is that since the arbitrator *may* find that the agreement was intended to bind successors, and that since Wiley is the successor of Inter-science, then Wiley is a potential party to a binding arbitration decree. . . . [This] does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the obligation to arbitrate or the obligation to respect the allegedly 'vested' rights of the employees." (Emphasis in original) (R. 111)

In so deciding, the Court held the Union the proper party to assert the claims since it had not been formally decertified nor was a rival union purporting to represent the employees (R. 96).

The Court held the issues tendered by the Union arbitrable, relying on the teaching of *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-5, "that the dispute is to be arbitrated unless it is perfectly clear that it is specifically excluded" (R. 96-101).^a The Court reached this conclusion even though the issues

^a At this point in its opinion, the Court states "a distinction is made, on the very face of the agreement, between ordinary grievances personal to the individual employees, on the one hand; and other, perhaps more important disputes, such as the one before us, relative to 'matters affecting the entire bargaining unit', both of which, however, are subjected to arbitration" (R. 100). This statement is presumably directed at the alternate ground upon which the District

(Footnote continued on following page)

raised related to terms of employment for a period after the expiration of the collective bargaining agreement and with respect to a bargaining unit other than the bargaining unit to which the agreement pertained. The Court reasoned that since the right to a continuation of the terms of employment beyond the term of the agreement was claimed by the Union to have "vested" during the term of the agreement, its claim involved a dispute as to the interpretation or application of the agreement, and was therefore arbitrable (R. 99).

Finally, the Court held that whether the Union had to comport with the contract grievance procedure, and if so, whether it did, and if not whether compliance was excused, were questions of "procedural arbitrability" which were to be decided by the arbitrator and not by the Court (R. 101-107).

Summary of Argument

I.

The Court of Appeals required Wiley to arbitrate whether it was bound by the obligation to arbitrate contained in the Interseience collective bargaining agreement. This is contrary to the principle that "whether or not the company is bound to arbitrate, as well as what issues it must arbitrate", must be determined by the court (*Atkin-*

(Footnote continued from preceding page)

Court rested its decision to the effect that arbitration was limited to grievances involving an "affected employee". However, Article XVI reveals no such distinction. Any "differences, grievance or dispute", without distinction, which is within the scope of Article XVI is made subject to the identical procedure, "which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute". The source of the quotation—"matters affecting the entire bargaining unit"—used by the Court is uncertain (R. 100). Such language is not contained in the contract, although similar language is used by Judge Sugarman—"matters involving the entire collective bargaining unit" (R. 55)—and possibly the reference is to his language.

son v. Sinclair Refining Co., 370 U. S. 238, 241 (1962)), unless there is a "clear demonstration", not present in this case, of a purpose to commit this issue itself to the arbitrator.

II.

Wiley is not obligated to arbitrate the issues tendered by the Union.

A.

The threshold question is whether Wiley is bound by Interscience's agreement to arbitrate. The Interscience agreement did not purport to bind successors and Wiley notified the Union in advance that it would not assume the agreement. The Union relies on Section 90 of the New York Stock Corporation Law to supply the nexus but the Court properly held that it does not do so. Federal and not State law is controlling and in the absence of binding authority, the Court (and not the arbitrator) is called upon to establish the applicable rule of federal common law. The question to be determined is as follows: Absent a provision binding successors in the collective bargaining contract, or an agreement express or implied to assume that contract by the surviving company to a merger, should the grievance and arbitration machinery provided for in the predecessor's contract be imposed upon the surviving company to the merger?

The principles to be applied should be drawn from decisions of the courts and the National Labor Relations Board which have considered whether an employer is required to step into the shoes of its predecessor. Of particular relevance, since labor arbitration is an adjunct to collective bargaining, is the rule stated in cases such as *N.L.R.B. v. Aluminum Tubular Corp.*, 299 F. 2d 595 (2d Cir. 1962), that a successor employer is not required to bargain with a certified union where there has been a

substantial change in the employment enterprise. The Court should adopt a similar rule here. In view of the substantial change in the employing enterprise and the integration of the Interscience employees into a single Wiley employee unit, Wiley should not be required to arbitrate with the Union, especially with respect to matters as to which Wiley may be called upon to bargain with the enlarged Wiley bargaining group.

B.

Not every claim is arbitrable. Even in the absence of a specific exclusion, the issues tendered for arbitration must be within the scope of the contract. A distinction must be made between a frivolous claim and a frivolous assertion that a claim is within the scope of the contract. The Union's claim, which is essentially that the employees have the right to indefinitely continue in Wiley's employ under the conditions of employment provided in the Interscience contract, cannot fairly be said to fall within the scope of that contract which dealt solely with conditions of employment in the Interscience bargaining unit during the contract period. The Court of Appeals accepted the Union's *assertion* that the right to continued employment in the Wiley unit had "vested" under the Interscience contract and therefore must be arbitrated under that contract. Instead, it should have made a critical analysis of the "vested rights" claim to determine whether the assertion that the claim falls within the scope of the contract was frivolous. The Union is not seeking to arbitrate previously earned "vested rights". It is misusing the concept of vesting to fit its claim to future working conditions so that it can appear to fall within the scope of the contract. The Court of Appeals should have decided, from the face of the claim, that it was without root or foundation in the contract and should have affirmed the District Court's dismissal of the suit.

Zdanok v. Glidden, 288 F. 2d 99 (2d Cir. 1961), on which the Union relied in bringing this suit, does not support its claim that the working conditions under the Interscience contract carry over, after the expiration of that contract, to the Wiley establishment. *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), a later decision by the same Court, specifically limits that decision to its facts; holding that it does not "stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken" (at p. 186).

The presumption of arbitrability of the *Steelworkers* cases* on which the Court of Appeals relied does not justify the reference to arbitration. The *Steelworkers'* rule assumes that the claim whose arbitrability is questioned is "on its face governed by the contract" and that it relates to an existing collective bargaining relationship between the Union and the employer, neither of which is true in the instant case.

C.

The Union is not the proper party to enforce the rights, if any, of the employees under the Interscience contract. With the disappearance of the collective bargaining unit, its own collective bargaining agency terminated. Thereafter, it is an intruder. It loses its right to enforce its contract, whether the termination of its agency results from the certification of another union in its place, or its own decertification, or as here, by merger of the bargaining unit into a larger unit which it does not represent.

We have discussed this Point from three different aspects. The Point is really not divisible, however. The

* *United Steelworkers v. American Manufacturers Co.*, 363 U. S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation*, 363 U. S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

single question, different in the whole from the sum of the parts, is whether Wiley can be compelled to arbitrate with the Union the particular claims which the Union asserts. For the reasons stated, and for the overriding reason that the Union's claim runs counter to all established concepts of employer-employee rights and relations, the answer must be clearly no.

III.

The Court must determine in this Section 301 action whether the defendant has breached its promise to arbitrate. While steps in the grievance procedure or the time limitations imposed thereon may be merely promissory and not conditional, the parties, if they choose, may condition their promise to arbitrate on a timely statement of grievance or demand for arbitration or on other preliminary steps. The Court when called upon to enforce the promise must first determine whether conditions precedent have been prescribed, and if so, whether they have been performed or excused.

The District Court properly found that the Union made no effort to comply with any of the contract grievance procedures and that in effect it had "abandoned" its claims. The Union made no demand for arbitration prior to suit. It did not even state the issues it tenders for arbitration which, insofar as they are not moot, relate only to post-contract working conditions.

The Union's failure to take the basic steps preliminary to arbitration was not merely a failure to comply with conditions precedent to arbitration. It was in effect an election to surrender the right to arbitrate in favor of negotiation.

The District Court properly dismissed the Union's suit. The Court of Appeals erroneously reversed and directed arbitration of questions not within the province of the arbitrator to decide.

ARGUMENT

POINT I

The Court should have determined whether Wiley is obligated to arbitrate the issues tendered by the Union and should not have referred that question to arbitration.

This is an action to compel arbitration under Section 301 of the Labor Management Relations Act. It is an action to enforce a promise. To succeed, the plaintiff must establish, to the satisfaction of the Court, (1) a promise to arbitrate, binding upon the defendant, (2) issues tendered for arbitration which are within the scope of the promise to arbitrate, and (3) a breach of the promise.

The obligation of the Court to decide these threshold questions was clearly stated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

"The Congress . . . has by Section 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached its promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed/so to submit,"

and in *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241 (1962):

"Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

See also, *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 570-71 (concurring opinion) (1960); *Drake*

Bakeries v. Bakery Workers, 370 U. S. 254, 256 (1962); *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert den. 374 U. S. 830 (1963); *Local Union 998, United Automobile Workers v. B & T Metals Co.*, — F. 2d —, 47 CCH Lab. Cas. ¶ 18,191 (6th Cir. 1963).

Professor Cox put it this way:

"Section 301 covers only 'suits for violations of contracts,' which means suits to enforce a promise or to recover damages for the breach. Two conclusions follow logically: (1) that the plaintiff must lose unless he shows nonperformance of a promise to arbitrate; (2) that the court must decide whether the plaintiff has made his case." *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1507 (1959).

The Court of Appeals has required Wiley to arbitrate whether it is bound by Interscience's "obligation to arbitrate" rather than decide the question itself (R. 94, 95). That in this case the determination turns not upon Wiley's own contractual undertaking, but upon whether Wiley is bound by a contract made by its "predecessor" Interscience, does not alter the principle involved. Wiley's obligation to arbitrate, if it exists at all, must be found in a contract which expressly or by implication is binding upon it, and it is the responsibility of the Court to make that determination, and not to refer the question to arbitration.

A party, of course, may contract to refer the question of arbitrability to an arbitrator, in which case a refusal to arbitrate on the ground that the grievance is not arbitrable would itself be a breach of contract. *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 571 (1960) (Brennan, J., concurring). Where a party asserts that that is the case, he "must bear the burden of a 'clear demonstration' of that purpose." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, fn. 7 at 583 (1960).

There was no such assertion in this case and there certainly was no "clear demonstration" of such purpose. The Court of Appeals has applied the rule in reverse, submitting the issue of arbitrability to the arbitrator because *Wiley* has not demonstrated the parties' intention to *exclude* the issue of arbitrability from the arbitrator.*

We think the Court was misled by its preoccupation with the question whether the merger "necessarily terminated" the Interscience contract. The "first and preliminary question" to be decided was not whether the Interscience contract had been *terminated* by the merger (R. 93) but whether Wiley, expressly or by implication, had become *obligated* under that contract to arbitrate the tendered issues with the Union. (See Point II.) That was for the Court to decide, and the reference of that question to the arbitrator was error.

POINT II

Wiley is not obligated either expressly or by implication to arbitrate the issues tendered by the Union.

A.

Wiley is not bound to arbitrate with the Union.

The threshold question for decision by the Court is whether Wiley is bound by Interscience's agreement to arbitrate.

The Interscience contract did not purport to bind successors and Wiley did not agree to be bound. On the con-

* Judge Medina said:

"... we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract..." (R. 94).

Judge Kaufman said:

"We hold [that the agreement] does not clearly remove [the question] from the scope of arbitration" (R. 110)."

trary, it notified the Union in advance that it would not assume the contract or recognize the Union.

To supply the essential nexus, the Union argues that Wiley is bound by Section 90 of the New York State Corporation Law¹⁰ to assume Interscience's obligation to arbitrate with it. Wiley denied the applicability of that Section and the Court below agreed.¹¹

State law is not to control, *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957), and because this is the first time the question has been presented in a Section 301 action, the applicable federal common law must be established.

The question to be determined (by the Court and not the arbitrator) can be stated in this manner: Absent a provision binding successors in the collective bargaining contract, or an agreement express or implied to assume the obligations of that contract by the surviving company in a merger, should the grievance and arbitration machinery provided for in that contract be imposed upon the surviving company to the merger?

The Court of Appeals refused to pass on the question other than to decide that the Interscience contract was not "ipso facto" terminated by the merger, and it delegated to the arbitrator the duty to make the decision. We have already argued the error of this referral. (Point I.)

Whether the "successor" is a successor by merger, as here, or a successor through purchase or reorganization or otherwise, is a technicality of no importance to those concerned with the bargaining unit. And those concerned with the bargaining unit, management as well as labor,

¹⁰ Quoted at pages 3-4, *supra*.

¹¹ The closely written merger and consolidation statutes of the several states were obviously not written with this kind of question in mind.

are equally indifferent whether the question arises, as here, in an action to enforce a collective bargaining contract or in a representation proceeding or a proceeding to enforce bargaining rights before the National Labor Relations Board.

What is of basic importance to the parties is whether the bargaining unit continues in existence, and if so whether the employing enterprise, regardless of its ownership, remains basically the same.

If these conditions continue, the collective bargaining relationship and all that it implies, including the adjunctive remedy of arbitration,¹² continue as before. If the conditions no longer exist, the collective bargaining relationship and the adjunctive remedies, including arbitration, are no longer appropriate.

There are many decisions which lead to this principle. Some deal directly with the question whether a "successor" is required to arbitrate under a collective bargaining agreement entered into by another employer. In *Livingston v. Gindoff Textile Corp.*, 191 F. Supp. 135 (S.D.N.Y. 1961), the Union sought to require a new corporation (Berlin) formed by certain minority stockholders of a dissolved corporation (Gindoff) to submit to arbitration under the terms of an agreement made with the dissolved corporation. The court denied the Union's application, basing its decision on material differences between the corporations in control, location and volume of business, all factors present in the case at bar.¹³

¹² Arbitration is a part of the bargaining process itself. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960).

¹³ The Court of Appeals distinguished this case on the ground that it involved a dissolution (and reincorporation) rather than a consolidation (Court's footnote at R. 96). However, the formalities of corporation law should not govern the issue presented. The "factual relationship" between the predecessor and the successor was substantially no different than the relationship between Interscience

(Footnote continued on following page)

Other decisions have dealt with whether the new employer is bound by the collective bargaining agreement of the former employer. See, for example, *Administrative Decision of General Counsel*, Case No. SR-1880, 50 LRRM 1078, 1962 CCH NLRB ¶ 11,208; *Administrative Decision of General Counsel*, Case No. K-313, 37 LRRM 1457 (1956); *Administrative Decision of General Counsel*, Case No. K-64, 36 LRRM 1521 (1955), holding that a purchaser of business assets is not required to recognize the collective bargaining agreement of the former employer.

In *L. B. Spear & Co.*, 106 NLRB 687 (1953), the Board held that where as a result of the acquisition by one company of 92% of the stock of another the operations of the two companies were integrated, a collective bargaining agreement with one of the companies would not under the Board's "contract bar" rule bar a representation election under Section 9(c) of the National Labor Relations Act.

Many cases have involved the question whether a successor employer is required to assume its predecessor's obligation to bargain with a recently certified union. The following is a sampling of cases holding that there is no obligation to bargain with the union; *N.L.R.B. v. Aluminum Tubular Corp.*, 299 F. 2d 595 (2d Cir. 1962) (a smaller business absorbed into a larger one); *N.L.R.B. v. Alamo White Truck Service Co.*, 273 F. 2d 238 (5th Cir. 1959) (change of status from a branch of a nation-wide corporation to an independently owned business); *N.L.R.B. v. Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (10th Cir. 1953) (purchase of assets and continuance in part of op-

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and Wiley. See also *Matter of Livingston*, New York Law Journal, Dec. 12, 1961, page 13, 43 CCH Lab. Cas. ¶ 50,417 (Sp. Term, N. Y. Co. 1961), the same case in the New York courts; *Office Employees International Union v. Ward-Garcia Corp.*, 42 CCH Lab. Cas. ¶ 16,766 (S.D.N.Y. 1961); *Copenhagen Castle Beer Corp. v. Beer Drivers Local Union No. 24*, CIO, 126 NYLJ 262 (Aug. 15, 1951), 20 CCH Lab. Cas. ¶ 66,511 (Sp. Term 1951); *Application of Swift & Co.*, 76 N.Y.S. 2d 881 (Sp. Term 1947).

erations); *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956) (integration of smaller unit into larger operation); *Administrative Decision of General Counsel*, Case No. SR-1446, 48 LRRM 1519, 1961 CCH NLRB ¶ 10,287 (merger of two companies); *Administrative Decision of General Counsel*, Case No. K-346, 37 LRRM 1472 (1956) (integration of operations and minority status of former employees of predecessor).

The rule was succinctly stated in *Cruse Motors, Inc.*, 105 N.L.R.B. 242, 247 (1953), quoted with approval by the Court of Appeals for the Second Circuit in *N.L.R.B. v. Aluminum Tubular Corp.*, *supra*, at page 598:

“ ‘A mere change in ownership of the employment enterprise is not so unusual a circumstance as to affect the certification. Where the enterprise remains essentially the same, the obligation to bargain of a prior employer devolves upon his successor in title.

• • •

“ ‘Where, however, the nature or extent of the employing enterprise, or the work of the employees, is substantially changed, the transfer of a part, or even all, of the physical assets does not carry along with it the duty of the former owner to continue bargaining with the former exclusive representative [citations omitted]. The purchaser in such a situation is not a successor employer. The controlling fact in each case is therefore whether the employment enterprise substantially or essentially continues under the new ownership as before.’ ” (Emphasis added.)

There is impelling reason to adapt and apply that rule here. Wiley is an entirely different employing enterprise from Interscience. The former Interscience employees have lost their group identity and have been absorbed in the single Wiley bargaining unit. The Union in effect is

an intruder, having no relationship with Wiley. Under the circumstances, there can be no justification for the imposition of a duty upon Wiley to arbitrate with the Union, particularly with reference to issues which Wiley may be called upon to bargain with its own enlarged bargaining unit.

The Court of Appeals attempted to distinguish *Cruse Motors* and *Aluminum Tubular Corp.* It said that the controlling principle in those and similar cases, that employees should be afforded the opportunity to select another union which may better serve their interests where there has been a substantial change in the employment enterprise, has no application to this case where "the binding character and meaning of contractual rights under a preexisting agreement" is at issue (fn. 3, R. 95, 96). We think the distinction is one of detail and not of substance. The principle logically should apply with equal force to the Union's position in arbitration as well as in bargaining when the matters in issue apply, as here, to current and future working conditions. In either case, whether for bargaining or arbitrating, the employees should have the right to be served by another union, or no union at all.

Interscience's obligation to arbitrate with the Union was not assumed by Wiley and there is no justification in the facts of this case to impose that obligation on Wiley by implication or by operation of law.

B.

The issues tendered for arbitration are not arbitrable under the Interscience contract.

Not every claim is arbitrable. The right to arbitrate is not unlimited, even in the absence of a specific exclusion,

since arbitration necessarily is limited to a claim "within the scope of the contract". Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1500-1517 (1959); Hays, *The Supreme Court and Labor Law*, October Term, 1959, 60 Colum. L. Rev. 901, 931 (1960). Cf. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 568 (1960).

In ascertaining whether a claim is within the scope of the contract, the Court must draw the crucial distinction between a frivolous claim within the scope of the contract and a frivolous assertion that a claim is within the scope of the contract. As Professor Cox has stated:

"[A]rbitration should be ordered in an action under section 301 whenever the claim might *fairly* be said to fall within the scope of the collective bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied." (Emphasis supplied)"

Judge (then Professor) Paul R. Hays strongly endorses Professor Cox's statement and comments that "difficult as the application of this distinction may be [between a frivolous claim that is within the scope of the agreement and a frivolous assertion that a claim is within the scope of the agreement], it is basic to the determination of the

"Cox, *supra*, at 1516. In an earlier article, Professor Cox expressed the thought in this language:

"[T]he court's role is limited to determining whether the moving party is *really* basing its claim on the contract or is seeking to have the arbitrator decide according to equity and sound industrial relations. In the latter event arbitration should be denied". (emphasis supplied) Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 261 (1958).

place of the courts in the arbitration process". Hays, *supra*, at 931.¹²

The claims which the Union seeks to arbitrate cannot fairly be said to fall within the scope of the contract. The contract dealt exclusively with conditions of employment in the Interscience bargaining unit during the life of the contract. The bargaining unit was limited to employees at Interscience's 250 Fifth Avenue location, "or at any branch office of said location hereafter opened by the Employer [Interscience] in the Greater New York area" (Sec. 1.1, R. 12).¹³ The agreement was to "continue in full force and effect for a term of two (2) years ending January 31, 1962" (Sec. 24.0, R. 34). It specifically provided that it contained "the whole agreement of the parties" and that "there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein" (Sec. 30.0; R. 36). It did not contain the customary "successor" clause.¹⁴

¹² Judge Hays stated that this distinction had been "ignored" by this Court in the *Steelworkers* cases. While the court did not expressly discuss the distinction, the issue apparently not having been raised, it did state that the court must determine whether the claim was "on its face governed by the contract" (*United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 568), and cited and quoted with approval the two articles by Professor Cox to which we have referred at footnote 14, *supra* (363 U. S. 564, 568; 363 U. S. 574-583). The inapplicability of the rules laid down in the *Steelworkers* cases to the case at bar is hereafter discussed. See page 42, *infra*.

¹³ Interscience's office was closed as a result of the merger. Wiley's much larger office can hardly be considered a "branch" thereafter "opened" by Interscience.

¹⁴ "Successors clauses are commonly found in collective bargaining agreements." See *Parker v. Borock*, 5 N. Y. 2d 156, 161, 182 N.Y.S. 2d 577, 581, 156 N. E. 2d 297, 299 (1959); *Matter of Acme Baking Corporation* [District 65], 2 N. Y. 2d 963, 964, 162 N.Y.S.

(Footnote continued on following page)

The agreement dealt only with the conditions of employment in the bargaining unit and during the contract term. It did not deal with conditions of employment in a different bargaining unit or for the period after the contract had expired, matters to which the Union's claims are addressed.

The Court of Appeals accepted the Union's assertion that the right to work for Wiley under the conditions of employment stated in the Interscience contract "vested" under that contract, and therefore must be arbitrated under that contract. Instead, it should have made a critical analysis of the Union's "vested rights" theory to determine whether the assertion that the claim falls within the scope of the contract was frivolous. The Union is not seeking, as the Court supposed, to arbitrate the existence and enforcement of commonly recognized "vested rights" which had previously been "earned" or "accrued". The Union's claims are of an entirely different character, and its misuse of the concept of "vesting" in order to fit the claims within the scope of the contract is clearly frivolous and should not have been accepted at face value by the Court.

The Court did not meet its responsibility by suggesting that court enforcement of an arbitrator's award would be refused if, "although purporting to define and implement rights accruing under the contract although matur-

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2d 363, 364, 142 N. E. 2d 427 (1957); *Matter of Mincola Manufacturing Company*, 146 New York Law Journal, page 9, August 15, 1961, 43 CCH Lab. Cas. ¶17,135 (Sup. Ct. Nassau Co.) (involving another District 65 contract); 2 BNA, *Collective Bargaining, Negotiations & Contracts*, page 70:181.

The Court of Appeals nevertheless said:

"And we reach this conclusion [that the consolidation did not *ipso facto* terminate all rights] despite the fact that the agreement contains no statement that its terms are to be binding upon Interscience 'and its successors', and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled." (R. 93)

ing thereafter, he [the arbitrator] should make an award which is completely without root and foundation" in the contract (fn. 5, R. 98, 99). It should have decided, from its very nature, that the claim as a matter of law was completely without root or foundation in the contract and it should therefore have refused to make the reference to arbitration.

If the Court, when called upon to, refuses to make this kind of preliminary decision, the obvious intent of the parties to place some limit on the authority of the arbitrator will be nullified, unless the parties are resourceful enough to specifically exclude from arbitration all matters, no matter how far removed from the contract, to which the authority of the arbitrator is not to extend.¹⁸

The rights claimed on their face (R. 10) do not have their root or foundation in the Interscience contract, and the Court should have so decided. A summary follows of the claimed rights:

- (1) "Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962."

Article VI of the agreement provides that whenever practicable, seniority shall govern promotions, the filling of vacancies, layoffs and rehiring. The Union asserts that Wiley should be required to establish a seniority list for the period after January 31, 1962, and after

¹⁸ See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1422, 1500-01. We concede that a determination that the claim is not within the scope of the contract will frequently involve the merits of the claim. In view of the broad scope of collective bargaining agreements such a determination will be comparatively rare and in most instances the merits of the claim will be referred to the arbitrator. However, unless the Court is to abdicate its proper role in the arbitral process, it must on occasion consider the merits of a claim if necessary to determine whether it is within the scope of the contract.

that date make promotions, fill vacancies, lay off and rehire employees on the basis of seniority. Neither the Union nor the Court of Appeals has suggested how the alleged seniority rights are to be applied with respect to other employees (Interscience and Wiley) who comprise ninety percent of the enlarged bargaining unit.

The rights asserted by the Union should be distinguished from the recall rights recognized in *Zdanok v. Glidden*, 288 F. 2d 99 (2. Cir. 1961), affirmed on another issue 370 U. S. 530 (1963). In *Zdanok*, the agreement provided that laid-off employees with five years seniority should have recall rights for three years after layoff. During the term of the collective bargaining agreement, the employer laid off the plaintiff employees, terminated its operations at the plant where they had been working and removed to a new plant in another state. The Court held that the employees' rights to recall arose during the term of the agreement when they were laid off and were intended to survive the termination of the agreement and the transfer of operations elsewhere.¹⁹

¹⁹ Although as a question of contract interpretation the result reached by the Court of Appeals may have been correct, the rationale advanced by Judge Madden, writing for the majority, and particularly the language used, appears unsound. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1553. (1962). Professor Aaron makes this comment:

"In the absence of specific language in the collective agreement to the contrary, however, the rule has always been—as stated in the leading case of *System Fed'n 59 v. Louisiana & Ark. Ry.* [119 F. 2d 509 (5th Cir. 1941)]—that with reference to seniority, 'collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions . . .'" (*Ibid.* at 1542)

The Second Circuit, in a later decision written by Judge Hays strictly limited *Zdanok* to its facts and stated that the decision "cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken". *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (1962), cert. den. 374 U. S. 830 (1963), discussed at pages 40-42, *infra*.

In contrast, there has been no event here during the term of the agreement which would have brought the seniority provisions or the right to recall into operation. The Union simply seeks to extend the seniority provisions of the Inter-science contract beyond its term and to the entirely different Wiley establishment.

- (2) "Whether, as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962."

The right of an employee to a pension which has vested during the contract period does not terminate upon the expiration of the contract any more than does his right to wages earned but unpaid at the expiration of the contract. We have no quarrel with the cases cited by the Court of Appeals which merely affirm this principle.²⁰

The Union's claim is not that the employees have been deprived of any rights vested under the Plans (which are administered by the Union and over which Wiley has no control), but that the employees have a "vested" right to require continued contributions to the Plans by Wiley after January 31, 1962.²¹

²⁰ *New York City Omnibus Corp. v. Quill*, 189 Misc. 892, 73 N.Y.S. 2d 289 (Sup. Ct. 1947), modified on other grounds, 272 App. Div. 1015, 74 N.Y.S. 2d 925 (1st Dept. 1947), affirmed, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy v. Valentine*, 268 N. Y. 228, 197 N. E. 260 (1935). See Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Nw. U. L. Rev. 646, 648 (1959). Compare *Schneider v. McKesson and Robbins*, 254 F. 2d 827 (2d Cir. 1958) and *Finnell v. Cramet, Inc.*, 289 F. 2d 409 (6th Cir. 1961), where the employees' rights in the pension plan had not become vested.

²¹ Whether the Union employees have vested rights under the Union Welfare and Pension Plans depends upon the terms of those Plans and does not involve the interpretation or application of the collective bargaining agreement.

With equal logic the Union could insist on arbitrating a "vested right" to require Wiley to continue indefinitely to pay the wage rates in effect at the expiration of the contract.²²

- (3) "Whether the job security . . . provisions of the contract between the parties shall continue in full force and effect."

The reference to the "job security" provisions is not clear. It could refer either to the so-called "Basic Crew Clause" referred to in paragraph 14 of the Union's complaint (R. 9) or to Article VII (Discharges and Lay-offs) of the contract which limits the Employer's right to discharge and discipline employees to "just cause" (R. 17-18). Either would be consistent with the essential nature of the Union's claim, which is that the employees are entitled to continue to work under the terms of the Interscience contract for an indefinite period after its expiration.

The "Basic Crew Clause" provisions were confined to the term of the collective bargaining agreement and related expressly to the Interscience collective bargaining unit (R. 38-39). The Discharge and Layoff provisions were also clearly so limited (Sec. 24.0; R. 34). The Union asserts the right to arbitrate whether these provisions shall continue in full force and effect after January 31, 1962, and after the disappearance of the collective bargaining unit to which they related. There is no such right. See, *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), involving an unsuccessful attempt to arbitrate post-contract disciplinary action, discussed at pages 40-42, *infra*.

²² In its petition, the Union quoted the following statement:

"Presumably, if one accepts the idea that seniority becomes a vested right, there is no reason to prevent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right." (R. 46)

- (4) "Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract."

This is the only instance in which the Union alleges the existence of a right which may have accrued during the contract period.²³ To the extent that the Union asserts that the right to severance pay accrued on or prior to January 31, 1962, although payable at some future date, the issue, arguably, would involve the interpretation of the Interscience contract and be arbitrable as against Interscience.²⁴ However, the Union's claim is much broader; it asserts that if an employee is laid off after January 31, 1962, he will be entitled to severance payments measured not only by the length of his service with Interscience but also by his additional service with Wiley.

In re Potoker, 286 App. Div. 733, 146 N.Y.S. 2d 616 (1st Dept. 1955), *aff'd sub nom. Potoker v. Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 161 N.Y.S. 2d 609, 141 N. E. 2d 841 (1957), cited by the Court of Appeals (R. 97), involved a claim that severance pay had accrued under the contract, and not a claim as here; to a right to accrue severance pay in the future, after termination of the contract. Compare *Owens v. Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442 (1956).

- (5) "Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962, for vacation pay under the contract."

The Union's claim is not that the Union employees accrued vacation pay up to January 31, 1962—all such ac-

²³ In addition, of course, to the claim for contributions to the Union Welfare and Pension Plans for the four months ending January 31, 1962.

²⁴ But even in this limited form the issue should not be arbitrable as against Wiley. See subpoint A, *supra*, and subpoint C, *infra*.

crued vacation pay has been paid—but that the Union employees have the right to accrue future vacation pay, at the rate fixed by the terms of the agreement with Inter-science, for service after January 31, 1962, with Wiley.

In re Wil-low Cafeterias, Inc., 111 F. 2d 429 (2 Cir. 1940), cited by the Court of Appeals (R. 97), does not hold or even intimate that the rate of vacation pay or the right to accrue vacation pay in the future survives the expiration of the contract. That case dealt solely with vacation pay that had been earned during the contract period.²³ *Botany Mills, Inc. v. Textile Workers Union of America*, AFL-CIO, 50 N. J. Super. 18, 141 A. 2d 107 (1958), cited by the Court of Appeals (R. 97), also involves earned vacation pay, not the right to earn it in the future.

- (6) "Whether the . . . grievance provisions of the contract between the parties shall continue in full force and effect."

The Union refers to the grievance and arbitration provisions of Article XVI of the collective bargaining agreement which relate only to the Inter-science collective bargaining unit. The Union contends that these grievance and arbitration provisions "continue in full force and effect" not merely with respect to grievances which arose during or pertain to the contract term but also with respect to differences, grievances and disputes which may arise in the Wiley unit in the future.

²³ There an employee filed a claim in bankruptcy for one week's vacation pay which had accrued prior to the bankruptcy of the employer. The only issue in the case was whether the debtor, who had previously filed a petition for reorganization, had power to enter into the collective bargaining agreement under which the vacation pay was earned. The court, at page 432, stated:

"The consideration for the contract to pay for a week's vacation had been furnished; that is to say, one year's service had been rendered prior to June 1, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed."

Procter & Gamble Independent Union v. Procter & Gamble M/g. Co., 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), holds squarely that grievance provisions do not remain in effect beyond the contract term. The Court said that the right to arbitrate is a right belonging to the Union and not to the employees,²² that it depends on the existence of an agreement to arbitrate and that it does not carry over beyond the expiration of that agreement.

Procter & Gamble establishes the frivolity of the claim that the grievance provisions of the Interscience contract carry over beyond the expiration of that contract. It also establishes the frivolity of the Union's assertion that the claims "vested" during the term of the Interscience contract.

That case involved a contract which expired by its terms on May 13 and was not replaced by a new agreement until the following June 23rd. In the interim, grievances arose which would have been arbitrable under the contract had it remained in effect. The Union demanded arbitration; the employer refused. The District Court granted the Union's motion for summary judgment and the Court of Appeals reversed.

In reversing, the Court said that the contract had expired and that

"there is no ground whatever for considering that the old agreement still governs the relationship of the parties." (at p. 184)

It said that *Zdanok v. Glidden*, 288 F. 2d 90 (2 Cir. 1961), provides no support for the suggestion that the right to arbitrate carries over beyond the contract period as an incident of a continuing employer-employee relationship.

²² The *Procter & Gamble* and the Interscience contracts in this respect are the same, each granting the right to arbitrate to the Union.

It further said:

"We believe, however, that we should say that Zdanok cannot properly be read to govern situations which are not strictly within the facts there presented. More particularly the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken." (at p. 186)

Procter & Gamble, decided a month earlier than the instant case by a different panel of the same Court, is in basic conflict with the decision rendered below.

In each case, the Union contended that job security and grievance and arbitration provisions survived the expiration of the contract.

In *Procter & Gamble*, the Court denied arbitration. In this case it directed arbitration.

The difference appears to turn on the verbiage used. Because in *Procter & Gamble*, the Union asserted that rights continued beyond the contract term, on the theory that they were part of a *continuing* employer-employee relationship, its request to arbitrate was refused. Because the Union here asserted that similar rights "vested" during the contract term, and therefore continued thereafter, its request to arbitrate was granted.²⁷

We think the Court in *Procter & Gamble*, was clearly right. We think the Court below was clearly wrong. *Zdanok v. Glidden*, upon which the Union relied in bringing this suit (Petition, Pars. 5, 6; R. 46), does not hold that contractual obligations continue beyond the period for which

²⁷ And this, notwithstanding that the employer and the collective bargaining unit remained the same in *Procter & Gamble*, whereas here the employing enterprise is entirely different and the collective bargaining unit has disappeared.

they were expressly undertaken. Rights to seniority and to grievance and arbitration procedures, and to continued contributions to Welfare Plans, and to severance and vacation pay for future service do not "vest" during the contract period in the sense that they can carry over "beyond the period for which they were expressly undertaken."

The Court of Appeals in holding the issues arbitrable stated its reliance on the *Steelworkers* cases, "that the dispute is to be arbitrated unless it is perfectly clear that it is specifically and plainly excluded" (R. 100).²² It failed to recognize that that presumption of arbitrability rests on the premise that the claim tendered for arbitration can fairly be said to fall within the scope of the contract.

We read the teaching of the *Steelworkers* cases to be that where the claim "on its face is governed by the contract" (emphasis supplied), it must be arbitrated even though the claim itself is frivolous (the issue in *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564), unless it is explicitly excluded (the issue in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574). This Court in those cases assumed that the claims were "governed by" or were "within the scope" of the contract. Nothing in those cases is inconsistent with the principle that a court must deny arbitration of a claim which may not fairly be said to fall within the scope of the contract.²³

²² In an appropriate context, this would seem to be a reasonable restatement of the rule. In *United Steelworkers v. American Mfg. Co.*, 36 U. S. 564, 568, the function of the court in determining arbitrability was "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract". Justice Brennan, concurring, referred to the "presumption of arbitrability" that exists in disputes arising out of collective agreements. 363 U. S. 573. In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581, it was stated that "apart from matters that the parties specifically exclude, all the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement".

²³ See footnote 15, page 32, *supra*.

We also believe that the rule of the *Steelworkers* cases assumes that the claim relates to an existing collective bargaining relationship between the union and the employer, which is not to be found here.

The collective bargaining agreement is a "generalized code" covering the "whole employment relationship" (363 U. S. 578-9); "a system of industrial self-government" (363 U. S. 580) instituted by the parties with the intent that gaps be filled in by the arbitrator by reference to "the common law of the shop" (363 U. S. 580-82). Arbitration is "part and parcel of the collective bargaining process itself" (363 U. S. 578), and the grievance procedure "a part of the continuous collective bargaining process" (363 U. S. 581). The arbitrator's role is to accommodate the interests of the parties "by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties" (363 U. S. 581). It is upon these premises that the broad presumption rests that the parties intended to arbitrate all disputes within the scope of the contract that pertain to the collective bargaining relationship.

There is no justification for assuming that the parties intended to arbitrate claims which would usurp, not supplement, the bargaining process by compelling the arbitration of the conditions of post-contract employment which are properly the subject of future bargaining by the employer and the employees or their designated representatives.²⁰ Nor can the parties be presumed to have intended to arbitrate claims which do not pertain to the collective bargaining unit or the period of time with respect to which and con-

²⁰ See *Boston Printing Pressmen's Union v. Potter Press*, 241 F. 2d 787 (1st Cir. 1957), cert. den. 355 U. S. 817 (1957) (where the Court held that arbitration may not be used for the purpose of "establishing future labor conditions not specifically envisaged" in the earlier contract).

fixed to which the system of self-government under the collective bargaining agreement was erected. Nor is it reasonable to suppose that arbitration was intended on issues which involve parties not joined together in a collective bargaining relationship.

The implications of the issues raised by the Union go far beyond the limits of the collective bargaining relationship, extending to the indefinite future and possibly overlapping new and entirely different collective bargaining relationships.

Claims such as these, if seriously advanced, require a judicial answer and not an arbitrator's award. An arbitrator applies techniques based not upon law but industrial expediency.³¹ Indeed, he "has no obligation to apply the law even as he understands it."³² Surely, claims of such "unknown and unforeseen character" as those the Union makes here are not to be weighed and decided in this manner.³³

The claims tendered for arbitration are not arbitrable under the contract, and the District Court properly dismissed the suit.

C.

The Union is not the proper party to enforce the "property rights" asserted for the former interscience employees.

Assuming, as contended by the Union, that the former interscience employees have certain "property rights" which survived the termination of the contract, the ques-

³¹ Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U.L. Rev. 471, 482 (1962).

³² Cox, *Current Problems in the Law of Grievance Arbitration*, Rocky Mt. L. Rev. 247, 248 (1958).

³³ Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1121 (1950).

tion still remains whether the Union is the proper party to enforce them. We think it is not.

Interscience's contract with the Union recognized the Union as bargaining agent only for the bargaining unit defined therein, namely, Interscience's "clerical and shipping employees" located at 250 Fifth Avenue or at "any branch of said location" thereafter opened by Interscience in the New York area (Sec. 1.1; R. 11-12). The Union represented only that bargaining unit and has not been authorized to represent any other.

The Interscience bargaining unit, consisting of 40 Interscience employees, disappeared on October 2, 1961, when it was integrated into the larger bargaining unit of Wiley employees. With the disappearance of the Interscience bargaining unit, the bargaining agency of the Union terminated. *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956); *L. B. Spears & Co.*, 106 N.L.R.B. 687 (1953); *Administrative Decision of General Counsel, Case No. K-346*, 37 LRRM 1472 (1956); *Administrative Decision of General Counsel, Case No. SR-1446*, 48 LRRM 1519, 1961 CCH NLRB ¶ 10,287.²⁴

At the same time the Union's right to enforce the contract on behalf of the employees likewise terminated. *Retail Clerks v. Montgomery Ward & Co.*, — F. Supp. —, 45 CCH Lab. Cas. ¶ 17,735 (N. D. Ill. 1962), affirmed

²⁴ Until the commencement of these proceedings, four months after the merger, the disappearance of the bargaining unit and the resulting termination of the Union's agency was never seriously disputed by the Union. It has never sought to impose on Wiley the contract provisions with respect to such basic union institutions as the union shop and the union hiring hall. It has not challenged Wiley's refusal to recognize it as the representative of any of Wiley's employees or to bargain with it on that basis. It has not denied the obvious fact that the former Interscience employees have been integrated into the Wiley operations and no longer form a separate bargaining unit, nor has the Union asserted that it represents any appropriate bargaining unit within the Wiley establishment.

— F. 2d —, 47 CCH Lab. Cas. ¶ 18,232 (7th Cir. 1963); *Glendale Manufacturing Co. v. Garment Workers, Local 520*, 283 F. 2d 936 (4th Cir. 1960), cert. den. 366 U. S. 950 (1961); *Kenin v. Warner Brothers Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960); *Modine Manufacturing Co. v. Machinists*, 216 F. 2d 326 (6th Cir. 1954).

In *Kenin v. Warner Brothers Pictures, Inc.*, *supra*, a union which formerly represented Warner's employees sought to enforce a provision of an expired collective bargaining agreement which provided that Warner could not exploit certain movie sound tracks on television "during the life of the Agreement or thereafter" without obtaining the union's consent in the form of a negotiated agreement. The employees involved were at the time of the action represented by a second union, not a party to the proceedings. The court dismissed the complaint, holding the first union an intruder in a collective bargaining situation in which it was not the designated representative.

In *Modine Manufacturing Co. v. Machinists*, *supra*, it was expressly held that a union may not enforce a collective bargaining agreement to which it is a party after it is no longer the authorized representative of the bargaining unit.

In *Glendale Manufacturing Co. v. Garment Workers Local 520*, *supra*, an arbitrator had issued an award directing the employer to negotiate a wage increase for the last five months of an expired collective bargaining agreement. The union was subsequently decertified. The court refused to enforce the award, even though the negotiations pertained to the period when the union had been authorized to represent the employees, since the union was not authorized to represent the employees at the time the negotiations would take place.

In *Retail Clerks v. Montgomery Ward & Co.*, *supra*, the unions sued under Sec. 301 for specific performance of un-

expired collective bargaining contracts. The unions had earlier been decertified but no other union had been certified in their place. In dismissing the complaint, the District Court said:

"Since employees have a right to vote for no union as well as for union representation, the contracting union will lose its contractual rights where no new union representative is chosen in the same manner as where a rival union is selected." (45 CCH Lab. Cas. ¶ 17,735, at p. 27,208.)

The Court of Appeals affirmed, saying that:

"Any right to recognition as bargaining agent, which the plaintiff unions secured by virtue of their contracts, ceased and became inoperative on decertification. . . . An implied condition of the contracts was the continuance of that status as such certified representative." (47 CCH Lab. Cas. ¶ 18,232, at p. 28,954.)³³

The Court below distinguished *Glendale*, *Modine* and *Kenin* by saying that there was no showing here that the Union had been decertified or that there was a rival union or that the freedom of choice of any employee would be infringed by the Union's pressing of the employee claims (R. 96).

We think the distinction is not sound. *Kenin*, *Modine* and *Glendale* were cases involving a second union but *Montgomery Ward* was not. As we read those cases, the decisive factor was not that a new union had been certified or that the old union had been decertified or that a rival union was asserting claims. The decisive factor, common to each, was that the Union's authority to represent the

³³ It also said: "We do not reach the question of whether the employees (or some later certified bargaining representative) may enforce such provisions of these contracts" (*ibid.*).

bargaining unit had *terminated*. The common strain that runs through the cited cases and the case at bar is that the Union lost its collective bargaining agency, losing it either because of displacement by another union, or by decertification, or as here by merger of the bargaining unit into a larger unit.

The Court said it could see no reason why the Union should not enforce arbitration in the employees' behalf because "there appears to be no other person or entity in a position legally to [do so]" (R. 96). There are several answers to this. The Court assumes a present employee grievance whereas there is none. And it overlooks that if at a later date an employee has a grievance, he will be able either directly or through his then acting collective bargaining agent to assert it against the Company.²²

Arbitration "is part and parcel of the collective bargaining process itself". *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 564, 578 (1960). Since the Union cannot negotiate new terms of employment for the employees it formerly represented, it should not be allowed to accomplish the same end by arbitration.

* We have discussed this Point from three different aspects: that there is no obligation express or implied on Wiley's part to recognize the Union or its contract with Interscience; that the claims tendered for arbitration by their nature are not arbitrable under that contract; and

²² The provision in the agreement that the Union shall have the sole right to enforce the employees' rights (see 17.0; R. 30-31) obviously is intended to apply only while the Union remains as collective bargaining agent for the employees.

that the Union in any event is not in a position to assert them. There is really only one question presented, however, and that is whether the Union, now *functus officio*, can arbitrate for the employees it formerly represented the conditions under which they are to work in the Wiley enterprise.

But how can Wiley arbitrate these issues with the Union which does not represent the bargaining unit? How can the job security and grievance provisions of the Interscience contract be carried over to or be enforced in the larger Wiley unit without requiring Wiley to recognize the Union? How can seniority rights, which are a measure of the employee's relative standing within the group, be established for only a few members of the group? How can working conditions tailored for one Company be carried over to an entirely different bargaining unit in an entirely different company?

And what happens to the rights, if they are recognized, if a union other than the plaintiff should be designated as the employees' representative and should negotiate an agreement with different seniority and security and grievance procedures? And who is to police and enforce these "rights" while the Wiley unit remains unrepresented?

What Interscience's commitments to its employees might have been had Interscience not merged into Wiley, or what the Union's position vis-a-vis Wiley would have been had the Interscience bargaining unit remained separate and distinct in the Wiley establishment, are not the questions presented here. And what the Union's position vis-a-vis Wiley would have been were it asserting a grieved employee's claim for injury done to him while he was working in the Interscience establishment is also not the question here.

The single indivisible question, different in the whole from the sum of the parts, is whether Wiley can be com-

pelled to arbitrate with the Union the particular claims which it asserts. We think for all the reasons stated, and for the overriding reason that the Union's claim runs counter to all established concepts of employer-employee rights and relations, that the answer must be clearly no.

POINT III

- The Court should have determined whether the Union had complied or was excused from complying with the conditions precedent to Interscience's promise to arbitrate and should not have referred these questions to the arbitrator.

The conclusion that the court and not the arbitrator must determine whether there are conditions precedent qualifying the promise to arbitrate and if so, whether they have been performed or excused inevitably follows from the principle, recognized and approved by this Court, that the obligation to arbitrate is contractual in nature, and that Congress by Section 301 of the Labor Management Relations Act has assigned the federal courts the duty to determine whether a contract exists and if so, whether it has been breached.

A breach of contract is a "failure, without legal excuse, to perform any promise which forms the whole or part of a contract". 5 Williston, *Contracts*, § 1288 at page 3672 (Rev. Ed. 1937). There can be no breach of a promise until all conditions qualifying it have been performed. "If the condition is not fulfilled, the right to enforce the contract does not come into existence." 5 Williston, *Contracts*, § 663 at page 127 (3rd Ed. 1961).

Wiley has contended from the commencement of this litigation that the obligation to arbitrate contained in the Interscience contract was clearly qualified by conditions precedent with which the Union had not complied and, if

only for that reason, that it was under no obligation to arbitrate. This was expressly so held by the District Court. The Court of Appeals held that the issue was for the arbitrator.³⁷

The question of "arbitrability", whether "substantive" or "procedural", is simply whether a party is contractually obligated to arbitrate the issues tendered. Whether the reluctant party need not arbitrate because it did not agree to arbitrate the issues tendered, or whether it agreed to arbitrate them, but only upon compliance with specified conditions precedent, does not change the essential nature of the inquiry which must be made by the court in an action under Section 301—has the defendant breached his promise to arbitrate?³⁸

The federal and state courts have divided on the question of so-called procedural arbitrability. We list some of the cases below.

³⁷ The Court of Appeals did not pass on the question whether the procedural requirements constituted a condition precedent to the obligation to arbitrate. Judge Medina apparently assumed that "adherence to the grievance and arbitration procedure" was a condition precedent, but held that a decision as to whether there was such adherence was to be decided by the arbitrator (R. 101). Judge Kaufman stated that the arbitrator was to determine "whether the Union had to comport with the three-step grievance procedure, and if so, whether it did in fact comport with it or was relieved from doing so" (R. 110). This question is discussed below.

³⁸ To support its holding that the court need not decide "procedural" arbitrability, the Court below quotes (R. 103) the following language from *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 568:

"[The function of the Court] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

However, in that case this Court was stating a rule by which the court is to determine whether a dispute is to be referred to arbitration. The Court of Appeals has erroneously read this statement as bearing on the entirely different issue here presented, which is whether the court or the arbitrator is to determine whether the dispute is to be arbitrated.

For the Court:

First Circuit: *Boston Mutual Life Insurance Co. v. Insurance Agents International*, 258 F. 2d 516 (1958); *General Tire & Rubber Co. v. Local 512, United Rubber Workers of America, AFL-CIO*, 191 F. Supp. 911 (D.R.I. 1961), affirmed 294 F. 2d 957 (1961); *Local 301 v. General Electric Co.*, 171 F. Supp. 886 (D. Mass. 1959).

Second Circuit: *Black-Claoson Company v. Machinists, Lodge 355*, 212 F. Supp. 818 (N.D.N.Y. 1962), at p. 823, affirmed on other grounds, 313 F. 2d 179 (1962).²²

Seventh Circuit: *Brass & Copper Workers v. American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied, 363 U. S. 845 (1960), petition for rehearing denied, 364 U. S. 856 (1960); *Grocery & Food Products Warehouse Employees, Local 738 v. Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N. D. Ill. 1963).

Eighth Circuit: *International Union of Operating Engineers v. Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958).

Ninth Circuit: *United Brick & Clay Workers v. Gladding, McBean & Co.*, 192 F. Supp. 64 (S. D. Calif. 1961).

Tenth Circuit: *Truck Drivers v. Grosshans & Petersen*, 209 F. Supp. 164 (D. Kan. 1962).

New York: *Matter of Board of Education [Heckler Electric Co.]*, 7 N. Y. 2d 476, 199 N.Y.S. 2d 649, 166 N. E. 2d 666 (1960) (citing *Boston Mutual* with approval); *Local 459, International Union of Electrical Workers v. Remington Rand*, 19 Misc. 2d 829, 191 N.Y.S. 2d 880 (Sp. Term N. Y. Co. 1959).

Ohio: *Vulcan-Cincinnati, Inc. v. Steelworkers*, 173 N. E. 2d 709 (Ohio App. 1960).

²² The rule in the Second Circuit has of course been changed by the decision of the Court of Appeals in the instant case, which it shortly thereafter followed in *General Electric Company v. Carey*, — F. 2d —, 47 CCH Lab. Cas. ¶ 18,151 (2d Cir. 1963), petition for certiorari filed (Oct. 1963 Term, Docket No. 114).

For the Arbitrator:

Third Circuit: *Radio Corp. of America v. Association of Professional Engineering Personnel*, 291 F. 2d 105 (3d Cir. 1961); *Philadelphia Dress Joint Board v. Sidele Fashions, Inc.*, 187 F. Supp. 97 (E. D. Pa., 1960); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 188 F. Supp. 225 (W. D. Pa. 1959), affirmed, 283 F. 2d 93 (3d Cir. 1960); *United Cement Workers International Union, AFL-CIO v. Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa., 1958) (purporting to apply state law); *Insurance Agents International Union, AFL v. Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa. 1954) (purporting to apply state law).

Fifth Circuit: In *International Association of Machinists v. Hayes Corp.*, 296 F. 2d 238 (1961), petition for rehearing denied, — F. 2d —, 47 CCH Lab. Cas. ¶ 18,257 (1963), cited by the Court of Appeals (R. 102), the Court determined that the union's claim was procedurally arbitrable, and did not, as the Court of Appeals in the case at bar has done, submit this issue to the arbitrator. However, in *Deaton Truck Line, Inc. v. Teamsters, Local 612*, 314 F. 2d 418 (1962), without discussion, it held that the issue was for the arbitrator.

Sixth Circuit: *Electrical Radio & Machine Workers, Local 748 v. Jefferson City Cabinet Company*, 314 F. 2d 192 (1963), petition for certiorari filed (Docket No. 104, Oct. 1963 Term).⁴⁰

California: *Hammond v. Maier Brewing Co.*, 47 CCH Lab. Cas. ¶ 50,865 (Cal. Super. Ct., Los Angeles Co. 1963).

New Hampshire: *Southwestern New Hampshire Transportation Company v. Durhan*, 102 N. H. 169, 152 A. 2d 596 (1962).

⁴⁰ However, in *Local 971, United Automobile Workers AFL-CIO v. Bendix-Westinghouse Automotive Brake Co.*, 188 F. Supp. 842 (N. D. Ohio, 1960), cited by the Court of Appeals (R. 102), the court was not presented with, nor did it indicate an opinion as to, the question of "procedural arbitrability" as that term is used in this case.

The position adopted by the Court of Appeals has been advanced by Professor Cox in his article, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1510 (1959). Professor Cox, after stating that "the court must decide whether the defendant has broken a promise to arbitrate" said that this does not require the court to decide questions involving compliance with the grievance procedure. *Ibid.*, pages 1508, 1510. He argues that such questions involve merely a dispute about the interpretation or application of the contract which "a fortiori" is for the arbitrator to decide. However, as he himself points out, the same argument had been made with respect to the scope of the arbitration clause itself (*ibid.*, pp. 1508-9),⁴¹ and was rejected on the ground that the court is called upon to enforce a contractual undertaking and necessarily therefore must determine the scope of that undertaking.⁴²

The same reasoning logically must apply to inquiries concerning the existence of and compliance with conditions precedent. Because the obligation to arbitrate is contractual, the court and not the arbitrator must decide whether the conditions to the promise to arbitrate have been complied with, and if not, whether compliance was excused.

The Court of Appeals reasoned that the parties had bargained for a determination by an arbitrator of the issues between them, and therefore an issue as to compliance with the grievance procedure should be decided by the arbitrator (R. 104). However, a dispute over compliance with the grievance procedure does not have the independ-

⁴¹ See also, for example, Gregory, *The Law of Collective Agreement*, 57 Mich. L. Rev. 635, 647-649 (1959).

⁴² See page 23, *supra*. Also see *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 571 (concurring opinion):

"Since the arbitration clause is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary."

ent significance of, for example, a dispute over working conditions or disciplinary measures. It is significant only insofar as it affects the right to arbitrate the substantive issues between the parties. It is, in effect, merely a dispute over the meaning of the arbitration clause, which "unless the parties clearly state to the contrary" is for the Court. *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 571 (1960).

The Court of Appeals was also concerned that committing the issue of so-called "procedural arbitrability" to the courts would enable the reluctant party to unduly delay arbitration.⁴³ The same opportunity for delay is open to any party by a challenge to the substantive arbitrability of the issues tendered for arbitration. The speedy resolution of grievances is generally as much desired by employer as by union, but it is nevertheless of vital importance to each that if the grievance and arbitration provisions are to be resorted to, they be invoked clearly and promptly, and before the other party has substantially changed its position.⁴⁴

We do not contend that all of the steps of a grievance procedure or the time limitations to which they are sub-

⁴³ In illustration, it pointed to the "miscellany" of contentions advanced by Wiley in the case at bar (R. 105). These contentions, upon examination, are merely a recitation of the contract grievance procedures ignored by the Union which sought to negotiate rather than to grieve and arbitrate.

⁴⁴ In the instant case, Wiley substantially changed its position as a result of the Union's failure to invoke the grievance and arbitration provisions of the contract and its reliance upon negotiations instead. This change in position is found not only in the consummation of the merger, as stated by Judge Sugarman (R. 56), but also, by Wiley's actions in (1) incorporating the Interscience employees into its Pension Plan and funding their past service with Interscience (R. 87); (2) retaining all former Interscience employees who wished to continue in the employ of Wiley (R. 61); and (3) paying substantial voluntary termination payments to those Union employees who voluntarily left their jobs after the merger (R. 87).

ject are necessarily conditions precedent. Some may be promissory rather than conditional.

The distinction between a "promise" and a "condition precedent" is well-established. See generally, Williston, *Contracts* § 665 (3rd Ed. 1961); 3A Corbin, *Contracts* § 633 (1960). "Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance depends upon the intent of the parties . . ." and this is to be ascertained from a fair and reasonable construction of the contract. Williston, *Contracts, supra*, § 663, at page 127.

If a court concludes that a procedural step (or the time limitation on such step) is merely promissory, it need go no further. The effect of failure to comply, or the validity of any excuse offered for such failure, is for the arbitrator to evaluate. Only as to those steps which the court finds are conditions precedent to the obligation to arbitrate need the court involve itself in "procedural arbitrability".⁴³ Where the parties choose to condition the obligation to arbitrate, the court's involvement to that extent is unavoidable. Otherwise, the court would ignore its judicial responsibility to determine whether the plaintiff has shown the defendant's failure to perform its promise to arbitrate.

The Court of Appeals refused to accept this responsibility. It did not "reach the merits of Wiley's contention that the Union did not comply with the procedural requirements of the collective bargaining agreement", but referred this question to the arbitrator (R. 107).

⁴³ The term "procedural arbitrability" which is commonly used should be confined to the issue of whether the promise to arbitrate is qualified by any conditions precedent and if so, whether they have been performed or excused. It appears that the term is sometimes erroneously used to pose the broader question (which is not relevant to our case) whether the court or the arbitrator is to determine the consequences of a failure to comply with the grievance procedure in all cases, regardless of whether the steps of the procedure or the time limitations to which they are subject are conditional or merely promissory.

The District Court correctly held that the Union had "failed to avail itself of the procedures under the contract which were a condition precedent to arbitration" (R. 55). It also rejected the Union's contention that Wiley was estopped from asserting or had waived these conditions precedent. If this court concludes, as we here urge, that the issue is one for determination by the court and not the arbitrator, it may wish to remand the case to the Court of Appeals for review of the District Court's decision on the merits. However, because we believe that this is not mandatory and that this Court may direct affirmance of the District Court's conclusion, we will address ourselves to the merits of the issue presented.

Article XVI spells out the grievance procedures leading to arbitration. (R. 27-30, See pp. 14-15, *supra*.) It requires:

(1) That the affected employee or group of employees themselves raise the grievance directly with the Company;"

(2) That this be done not later than four weeks after its occurrence or latest existence, and that it be referred to arbitration within two weeks thereafter unless the time be extended in writing;

(3) That if the difference must be arbitrated, the parties make an effort to name a mutually acceptable arbitrator.

"Interscience was a small company. The Union group, with a basic minimum of 26 (R. 39) and numbering no more than forty at the time of the merger, were clerical employees working in close contact with management. Their jobs, in the Union's own words, gave them "status and importance", and involved "responsibility", "challenge" and "intellectual response" (R. 66). It is understandable that the parties should have required that the grievance be discussed in the first instance by the affected employee and the shop steward with the Company.

These are the expressly stated conditions to the obligation to arbitrate. They are stated to be the "sole means" of adjustment of disputes of every nature. Failure to file the grievance (in writing, stating the nature of the claim and of the objections raised thereto) within the "time limitation" of four weeks is "to be construed and be deemed to be an abandonment of the grievance" (R. 29). The failure to make any effort to comply with any of them requires denial of the Union's suit to compel arbitration.

The Court of Appeals in referring the "procedural" question to the arbitrator indicated its belief that he might find that the Union had substantially complied with the required procedures or that Wiley had waived such compliance (R. 105). We think that no such inference was permissible.

The Court of Appeals said:

"Thus Wiley claims the Union was required to follow Steps 1, 2 and 3, described in Section 16.0. The Union replies that these applied only to an 'affected employee' and not to the controversy in this case which affects the entire bargaining unit." (R. 105)

The Court misread the contract. Contrary to its statement elsewhere in the opinion, no distinction is made between ordinary grievances personal to individual employees and other and "more important disputes" relative to "matters affecting the entire bargaining unit" (R. 100). The quoted phrase with respect to the entire bargaining unit is not to be found in the contract.

The Court said:

"The Union also points to the fact that there was an orderly exchange of views, and says this surely was a substantial compliance with the contract." (R. 105)

" See footnote 8, page 17, *supra*.

This likewise is erroneous. The Union's discussions with the Company related only to rights asserted for the balance of the contract term. These issues are now moot. There was no exchange of views on issues relating to the period after January 31, 1962 which the Union now seeks to arbitrate.

The Court of Appeals said:

"With respect to Wiley's claim that there was a failure to comply with the requirement of Section 16.6 that 'any grievance must be filed with the Employer and with the Union Shop Steward within four (4) [weeks?]' after its occurrence or latest existence', the Union replies that the question here is not a 'grievance', but a 'dispute' or 'difference' arising out of the agreement and that this Section has no application to a dispute over such a broad question as to whether all the employees had 'vested' rights under the contract inextinguishable by unilateral action by the employer; and that to say this is a 'grievance' to be filed 'with the Employer and with the Union Shop Steward' borders on absurdity." (R. 105)

With due respect, we again say that the Court has misread the agreement. The Court overlooked the opening statement in Sec. 16.0 (R. 27) that the term "grievance" as used in Article XVI includes every kind of difference, grievance or dispute arising out of or relating to the agreement, or its interpretation, application or enforcement.

The Union excused its failure to comply with the grievance procedures by saying that the grievance machinery "was never intended to take care of a situation of this nature where a whole Company itself is affected", asserting that such procedures were only to cover "the small

"The Court erroneously said "days".

grievance affecting a single employee" (R. 69). The Union's argument cuts both ways. The procedure outlined in the contract was the only procedure prescribed by the parties and was stated to be the sole means of determining all disputes. If the grievance procedure as so outlined did not apply to "a situation of this nature", the situation could not be arbitrable.

The Court said:

"Moreover the Union contends that, if some sort of notice of the dispute was required within four weeks after its 'occurrence or latest existence', the letter of June 27, 1961 filed within four weeks after the Union learned of the proposed consolidation was such notice." (R. 105)

The Union's letter of June 27, 1961 (R. 57-58) merely referred to the right asserted for the employees "to continued employment"; called upon Interscience to see to it that the employees "are not terminated from employment", and warned that "any impairment of the rights of the employees will be resisted to the fullest possible extent under the law". Certainly, there is no suggestion to be found in this letter of the rights claimed by the Union for the period following the termination of the contract.

The Court inferred that the arbitrator might find that the dispute "was plainly a continuing one" and therefore not barred by the four-week limitation of time (R. 105). This confuses a violation of law with the breach of a contract. A continuing violation of the law (whether such violation constitutes a felony or an unfair labor practice) does not clothe the violator with immunity no matter how long the violation may continue. See, e.g., *Von Eichelberger v. United States*, 252 F. 2d 184 (9th Cir. 1958) (unlawful possession of firearms); *United States v. Guertler*, 147 F. 2d 796 (2d Cir. 1945), cert. den. 325 U. S. 879 (1945)

(failure to keep draft board notified of address); *N.L.R.B. v. Epstein*, 203 F. 2d 482 (3d Cir. 1953) (unfair labor practice).

In contrast, a continuing *breach of contract* does not suspend the operation of a statutory or contractual statute of limitations. The limitation period runs from the moment the breach of contract first occurs, whether or not the breach is "continuing". 6 Williston, *Contracts*, § 2004 (Rev. Ed. 1938).

Finally, the Court suggested that the arbitrator might find "a clear waiver of procedural requirements by Wiley" (R. 105).

This suggestion is without foundation. Waiver could be found only if the Union was led to believe that a statement of the issues to be arbitrated and an effort to choose an acceptable arbitrator would be purposeless or unnecessary, and if it failed to perform these conditions precedent because of this belief.⁴⁰ Certainly, nothing that Interscience or Wiley said or did can be said to have lulled the Union into a belief that compliance with the grievance procedures would not be insisted upon. The Union's own affidavits indicate that the Company never departed from its position that it would recognize the contract until the date of the merger and that thereafter it would regard the contract as ineffective. This was an invitation to the Union to commence proceedings, not a suggestion that it defer them.

It is equally clear that compliance with the grievance procedures would not have been useless or futile. They

⁴⁰ 5 Williston, *Contracts* § 699 at page 352 (3rd Ed. 1961):

"* * * [I]t is essential that the promisor's conduct should be the cause of the promisee's failure to perform the condition. If the promisee could not or would not have performed the condition in any event, the manifestation of unwillingness or inability of the promisor to perform will not give rise to a cause of action because the promisee cannot allege and prove that he would have become entitled to receive performance by complying with the condition, had it not been for the promisor's misconduct."

were unilateral essential first steps to the framing of a controversy with the Company, and without them, there could be no obligation, nor breach of obligation, to arbitrate.

The complaint, in effect, demands arbitration of whether Wiley must commit itself, for the future, to the working conditions provided in the Interscience contract. These claims could just as well have been made, and arbitration demanded, in June, 1961 when the Union wrote to the Company, as in January, 1962 when the contract was about to expire. They certainly could have been made on September 19, 1961, two weeks before the merger, when the Company fully stated its position to the Union.

The Union chose not to arbitrate. It deliberately and intentionally took none of the steps preliminary to arbitration. Instead, it elected to negotiate. In choosing the one course, it surrendered the other. 5 Williston, *Contracts* § 683 (3rd Ed. 1961). Its suit for arbitration is frivolous and was properly dismissed by the District Court.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the order of the District Court reinstated.

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IN THE
Supreme Court of the United States
October Term, 1963

Docket No. 91

JOHN WILEY & SONS, INC.,

Petitioner,

against

**DAVID LIVINGSTON, as President of District 65, Retail,
Wholesale and Department Store Union, AFL-CIO,**

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE
Supreme Court of the United States
October Term, 1963

DOCKET No. 91

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, as President of District 65, Retail,
Wholesale and Department Store Union, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinions of the Court of Appeals (R. 88) are reported at 313 F. 2d 52 and the opinion of the United States District Court (R. 51) is reported at 203 F. Supp. 171.

The judgment of the Court of Appeals was entered on January 11, 1963 (R. 112). A petition for a rehearing *en banc* was denied on February 5, 1963 (R. 113, 114). The petition for a writ of certiorari was filed March 15, 1963. Certiorari was granted on May 13, 1963 (R. 118; 373 U. S. 908). The jurisdiction of this Court rests upon 62 Stat. 928; 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Court below, in holding that the question of substantive arbitrability is for the court, and not for the arbitrator to decide, actually held that the collective bargaining agreement between Petitioner's predecessor and the Union did not terminate upon the merger of the predecessor company into the larger non-unionized Petitioner, and, if it did not so hold, does the collective bargaining agreement, in fact, terminate upon such merger?

2. Are the questions of procedural arbitrability, questions of whether the Union has complied with the grievance machinery specified in the collective bargaining agreement, for decision by the Court or by the arbitrator, and if for decision by the Court, has the Union satisfied the requirements of the agreement in this case?

3. Whether a Court may direct arbitration as to the nature of, and the proper remedy for implementing employees' rights to seniority, pension plan, job security and grievance machinery and vacation and severance pay, claimed by a Union under a collective bargaining agreement with a Company merging with a larger non-unionized Company, where the merger takes place and arbitration is sought, during the life of the said agreement and where such rights are claimed to continue and to accrue after the termination of the contract?

4. Is the Union the proper party to conduct such an arbitration proceeding after a merger by a Company with which it was in collective bargaining relationship, with a larger non-unionized Company?

Statutes Involved

The pertinent section of the Labor Management Relations Act and Section 90 of the New York Stock Corporation Law are quoted at page 3 of Petitioner's brief.

Statement

This suit was brought by the Respondent, DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO (the "Union"), to compel Petitioner ("Wiley") to arbitrate issues relating to a collective bargaining agreement made by the Union with Interscience Publishing Co. ("Interscience"), which four months prior to suit had been merged into Wiley (R. 4).

The District Court had jurisdiction of the suit under Section 301(a) of the Labor Management Relations Act.

The District Court denied the order to show cause for an order directing arbitration (R. 43, 56). The Court of Appeals reversed and directed arbitration in accordance with its opinion (R. 107). A petition for a rehearing *en banc* was denied by the Court of Appeals (R. 112).

The Facts

While the facts are sufficiently set forth in the opinion of the Court of Appeals, a brief outline may be of further assistance. The Union and Interscience had a collective bargaining history going back to 1949, the most recent contract being dated February 1, 1960 and expiring January 31, 1962 (R. 76). In the early summer of 1961 word reached the Union employees that Interscience was joining forces with Petitioner herein, both being engaged in the manufacture and distribution of scientific books. The Union immediately addressed a letter to the Petitioner's counsel advising him, among other things, that "any impairment of the rights of the employees would be resisted to the fullest possible extent under the Law" (See *infra*, p. 6). Both Wiley and Interscience ignored this letter until September 19, 1961 when, on the initiation of Petitioner's counsel, a meeting was arranged between the parties wherein Petitioner and its representa-

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tives confirmed the fact that there was to be a merger and flatly announced that the collective bargaining agreement which had at that time had about five months to run would be terminated on the merger and that all rights of the employees thereunder would cease and that the Union's rights would likewise terminate (R. 58, 62, 69).

There then ensued a series of telephone conversations and conferences extending to January 4, 1962 when attempts were made by both sides to dispose of that problem. The details of the conversations are set forth in the course of the argument herein but, suffice it to say, the Union insisted upon its full rights and those of the employees and told the Company "time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract" (R. 68). Throughout these lengthy conversations and negotiations, at no time did the Company raise the question of compliance with the grievance machinery (R. 68).

On October 2, 1963, the merger took place (R. 79). District 65 and the employees were notified that there was no more contract and no more Union.

This action was commenced on January 23, 1962 to compel arbitration of five issues: (1) the seniority rights; (2) contribution to the Union's Security Plan and Pension Fund; (3) continuation of job security and grievance provisions; (4) severance pay; and (5) vacation pay. The Union contract provides for seniority (R. 15); welfare and pension contributions (R. 24); job security and grievance procedures (R. 17, 27); severance pay (R. 23); and vacation pay (R. 20). Further facts will be referred to as necessary to the argument.

While the Petitioner attempts to set forth additional facts, there are many inaccuracies contained in its presentation.

The first inaccuracy in Petitioner's brief consists in a statement that:

"Following the merger, the Interscience employees were integrated into Wiley's operations and thereafter no longer constituted a separate or distinct bargaining unit (R. 58)" (Pet. Br. 5).

The reference by Petitioner to page 58 of the transcript of record does not support the Petitioner's conclusion. It merely sets forth that on September 19, 1961, counsel for the Petitioner prophesied to the Union representatives what would happen on October 2 when the merger became effective. There is, in fact, no evidence of integration or that Interscience employees no longer constitute a separate or distinctive bargaining unit.

The second inaccuracy in the statement of facts made by the Petitioner lies in its allegation that the Union has not claimed to represent a

" * * * a majority of any appropriate bargaining unit in the Wiley establishment." ² (Pet. Br. 6)

Footnote 2 at page 6 of Petitioner's brief continues this inaccuracy by saying

" * * * even though they (Interscience employees) no longer constitute by themselves an appropriate bargaining unit." (Matter in parenthesis ours)

Implicit in the Union's entire case, both in its complaint (R. 3) and in its supporting papers (R. 61) is the claim of the Union that it represents the former Interscience employees. Repeated assertions by the Petitioner in its brief that the former Interscience employees do not constitute an appropriate bargaining unit are simply unsupported in the record on any factual basis. Usually it is the National Labor

Relations Board that must of necessity consider a myriad of facts and conduct an intensive investigation in order to determine what constitutes an appropriate bargaining unit and, while it may be important to Petitioner's position, the record is barren of this factual support.

While the Petitioner briefly refers to the Union's letter of June 27, 1961, in view of its importance, the entire letter is set forth:

"Dear Mr. Lieb:

District 65 has consulted us with respect to how the proposed 'joining forces' with House of John Wiley & Sons, Inc. by Interscience Publishers Inc. would affect the rights of their employees, members of District 65, and without limitation, their right to continued employment. While we do not have all the facts with respect to the 'joinder' of forces, according to their own announcement 'the publication and the distribution of our (Interscience) books' is to continue. We have come to the opinion that, under the agreement between the parties, our employees are entitled to continue working notwithstanding such joinder, and we call upon you to advise your client to see to it that the employees are not terminated from employment. Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law." (R. 57)

Petitioner's brief states that on June 27, 1961

"* * * the Company told the Union that it should feel free to discuss the merger with it at any time."
(R. 77-78) (Pet. Br. 6)

What the Petitioner fails to state is: it was not the "Union" that was so "informed". It was not the "Company"

which did the informing but a vice-president who talked to the employees (R. 77, 78). The vice-president never appears again in this case and it may be assumed that this conversation was an informal casual affair.

In the same vein is the statement that:

"On September 19, 1961, Interscience's counsel met with Union counsel and Union representatives."
(Pet. Br. 6)

Petitioner, however, fails to state that this meeting was initiated by the Petitioner and was the first answer by the Petitioner to the Union's letter of June 27, 1961 (R. 58, 62, 69 (fol. 72)).

Another inaccuracy in Petitioner's brief (p. 6) is its attempt to limit the Union's position merely to representing the employees

"... until the expiration of the contract on the following January 31."

While the Union certainly insisted upon such representation during the term of the contract, since that was an important part of the problem then before the parties, the Union never intended to limit its rights to this period. In the first place, the letter of June 27, 1961, protested against "any impairment of the rights of the employees" (R. 58) and it is clear that the Union would continue to protest any such impairment. Also, the

"Union took the position that the Union should continue to represent the employees even after the merger, and that the rights of the employees continue unaffected by the merger." (R. 62)

There was no limitation of time in any of its protests and positions.

Indeed in the discussions between the parties, including the first meeting between them on September 19, 1961, the Union counsel called Petitioner's counsel's attention:

" * * * to the recent decisions which had sustained the rights of employees notwithstanding removal of the plant or termination of the contract. We discussed seniority rights and severance pay as well."
(R. 62)

Also during the second meeting between the parties on September 26, 1961, the Union restated its position on Union recognition and the continuation of the contract (R. 62, 63, 67, 68).

While Petitioner's brief sets forth some of the views expressed by it at the September 19, 1961 meeting, it fails to set forth, that at said meeting Petitioner's counsel stated

" * * * that some jobs might be lost as a result of the combination of operations * * * " (R. 59)

and that at a later telephone conversation on September 28, 1961, the Petitioner refused to grant Interscience employees any seniority rights and stated that if the Union insisted upon such request, Petitioner would withdraw its offer to make severance payments and would hold no further conversations with the Union (R. 60, 61). Petitioner fails to state that at the earlier meetings between the parties the Union was informed that about 25 percent of the employees would not be at their jobs at Wiley; and it was only

"As a result of these conferences the Company finally yielded to the extent that it agreed to continue all the employees in their jobs." (R. 63, 64)

Petitioner's brief continues in this vein:

"The issues now sought to be arbitrated were not even discussed. The conversations before and after the

merger related to rights during the remaining term of the contract (R. 64, 68). And even some of these, as asserted in the complaint, were not referred to except by the catch-all phrase 'other rights' (R. 64) although the Union says that employees unnamed raised them with it (R. 67)." (Pet. Br. 11)

In view of the actual facts, it is somewhat shocking to find Petitioner making such unwarranted assertions.

During the September 28, 1961 conversation between the parties, the Union

"* * * requested, however, that the Interscience Union employees who entered Wiley employment should do so with their seniority rights vested in them." (R. 60)

The Union was insistent in its position (R. 61). Throughout the six meetings between the parties, the Union:

"* * * at all times, insisted upon recognition of the Union contract and that the rights of the employees be fully protected as they had accrued and become vested under the Union contract." (R. 62)

The Union constantly stated, without specifying any time:

"* * * that the rights of the employees continue unaffected by the merger." (R. 62)

During additional meetings between the parties attended by Union representatives and their counsel, the Union:

"* * * specifically insisted upon the continuation of the contract, upon seniority rights and grievance machinery and upon the other rights of the employees." (R. 64)

It was because of the issues of seniority, job security, grievance procedures, severance pay, vacation pay; and pension,

medical disability and health insurance payments both accruing during and after the termination of the contract, that the Union was unable to settle the controversy with the Company (R. 67). The Company was "made fully aware of the issues and problems" (R. 69). In fact, it was the position of the Petitioner that it "*never, never*" would "*in a million years*" agree to any disposition which would continue the rights of the employees which precipitated this litigation (R. 69).

It is small wonder, therefore, that this is the first time that the Petitioner contends that the issues now sought to be arbitrated were not discussed.

The complaint (R. 3), in alleging refusals by the Petitioner to recognize the property rights of the Interscience employees under the collective bargaining agreement "and otherwise beyond January 30, 1962", is further evidence that the Petitioner was not surprised by the issues presented by the Union for arbitration (R. 5, 8, 9). Particularly, with respect to the Basic Crew Clause which obligated the Petitioner to retain 26 "jobs", the complaint alleges that the Company:

" * * * has refused to continue said 'jobs' and to obligate itself to continuance of same, with all the benefits and rights appertaining thereto." (R. 9)

Again at pages 59 and 62 of its brief, the Petitioner unjustifiably seeks to give this Court the impression that the issues as presently framed were not discussed with Petitioner prior to the commencement of this action. The Union calls attention to the fact that nowhere in the original District Court answering papers of the Petitioner, is there even a *scintilla* of a claim that the issues, as presently tendered, were not fully discussed. See Mr. Lieb's affidavits (R. 57 and 86) and Mr. Lobdell's affidavit (R. 73). When these

affidavits are read in the face of the complaint filed in this case (R. 3) and the petition attached to the original Order to Show Cause (R. 44), it should be clear beyond peradventure that there was full discussion of these issues prior to the commencement of this proceeding.

If there is any proper foundation for the Petitioner's claim to surprise, it may be confidently stated that its affidavits submitted on the Order to Show Cause would have most certainly complained to the lower courts of such a situation and the lower courts would certainly have referred to such contentions at some point in the detailed opinions which were rendered in these cases.

While the Pension Plan of the Petitioner was made applicable to the employees, this action on its part is purely non-obligatory and the Company at all times refused to obligate itself to continue with the Union Pension and this refusal antedated the filing of the complaint (R. 9).

Because the petition for the writ of certiorari does not raise this question, this may be an additional reason for disregarding this point. See, Supreme Court Rule 40 (d) (2).

The Petitioner's assertions that none of the Interscience employees has asserted a grievance or raised any issue with Wiley about the terms and conditions of employment (Pet.'s Br. 10), is sharply contradicted by the Union (R. 66, *et seq.*).

Another inaccurate statement contained in Petitioner's brief is its assertion that

"The grievance procedures prescribed by the agreement 'were completely ignored' by the Union." (p. 11, Pet. Br.)

Footnote 4, page 11 of Petitioner's brief again sweepingly and erroneously states that this was admitted by the Union in the Turbane affidavit. The fact is quite to the contrary,

as a reference to the record clearly shows (R. 68). The Turbane affidavit states:

" * * * from the very first letter written by our counsel on June 27, 1961, down to the very last conference held on or about January 4, 1962, we consistently made it clear to the Company that we would do everything within our power to protect the employees' rights. We specifically told the Company and its representative time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract. It comes with exceedingly ill-grace on the part of the Company [fol. 79] to take the position of alleged lack of compliance by the Union with the grievance machinery of the contract. We had at least six meetings; engaged in a great deal of correspondence, and held several telephone conversations—all dealing with this subject, and the Company of course, was fully aware of the issues involved. At no time did the Company ask for or seek any other grievance procedures. Now, it is wholly improper for it to raise this question of alleged technical non-compliance by the Union. And as a matter of fact, it was the Company which initiated the grievance procedures followed in this case because it was Mr. Lieb, who in mid-September of 1961, called our counsel on the telephone and arranged for the first conference of September 19th (page 2 of Mr. Lieb's affidavit)." (R. 68, 69)

The facts are clear that the Union did not completely ignore the grievance procedures prescribed in the agreement. It made the grievances the subject of conference after conference, telephone conversation after telephone conversation and correspondence. Surely, all such communications be-

tween the parties should be held to be a substantial compliance with the grievance machinery of the contract.

It is most important to bear in mind that Wiley has no Union and there is no established policy with respect to "seniority rights," "job security," "grievance procedures" or "severance pay" (R. 77). While Interscience employees were ultimately covered by the Wiley Pension Plan, the Union Plan is greatly superior to the Wiley Plan (R. 48).

Summary of Argument

I

The Court of Appeals *did* determine that Wiley was obligated to arbitrate the issues tendered by the Union and did not refer that question to the Arbitrator. It held that this was a matter of substantive arbitrability which was for the Court to decide and it did so decide. The Union relies on Section 90 of the Stock Corporation Law of New York to bind Wiley as the surviving corporation of the merger. Even if the Union is wrong on this, as the Court of Appeals held it was, then Wiley is so bound as a matter of Federal Common Law.

II

The issues tendered for arbitration are arbitrable as being within the scope of the contract. Claims of seniority, severance pay, vacation pay, pension contributions, job security and the like, both accruing before the expiration of the contract and after the termination of the contract are *bona fide* claims. Certainly, those rights accruing prior to the termination of the contract are arbitrable beyond peradventure of doubt. Those obligations continue and accrue even after the contract terminates and are embraced within the term "seniority" and "jobs" which were sustained in *Zdanok v. Glidden*, 288 F. 2d 99 (2 Cir. 1961), *aff'd* other g'd, 370 U. S.

530 (1962), reh den, 371 U. S. 854 (1962). "Seniority" and "jobs" constitute a bundle of legal relations between the Employer and the Union and the employees, and under *Zdanok*, unless the same rights continue to the employees, even after the termination of the contract, then "seniority" and "jobs" become meaningless.

The Union is seeking not only to arbitrate the rights which vested and matured prior to the termination of the contract, but is also seeking to arbitrate the rights vested prior to the termination but which have continued to flow after the contract terminated. It is not for the Court to determine the nature of these rights. To do so would ignore the teachings of the *Steelworkers* decisions. *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

In effect, the Petitioner is asking this Court to depart from the rulings of the *Steelworkers* cases. As the Court of Appeals held, following the teachings of these cases, it is up to the Arbitrator to carry out the bargain of the parties so that they have the benefits of his creativity and expertise in determining the nature of, and proper remedy for implementing, the rights as to seniority, pension plan, job security, grievance procedures and vacation and severance pay. Any other decision would contravene the

"perfectly clear intention that the questions propounded by the Union be arbitrated." (R. 100, opinion of the Court of Appeals).

This Court has held that the termination of a contract does not bar arbitration and that the Union's representation rights are not in anywise affected. *United Steelworkers v. Enterprise Wheel, supra*.

An important part of the Union's argument which permeates its entire case is that the Union is the proper enforcing agency and that the rights of the employees flow through it. However, even if it is held that the Union's representation rights had ceased, the employees' rights nevertheless continue, limited to their individual relationships which still continue, and in any event, must be held to survive and accrue.

III

The Court of Appeals correctly held that matters of procedural arbitrability were for the arbitrator. If the Union be wrong in this contention, then this Court should hold that the facts establish substantial compliance by the Union with the grievance machinery under the Union contract and a waiver by the Company to insist on such provisions.

POINT I

The Court of Appeals held that substantive arbitrability was for the Court and held that Wiley was obligated to arbitrate.

The opinion of the Court below clearly and unequivocally holds that Wiley was obligated to arbitrate the issues tendered by the Union and did not refer that question to arbitration.

Circuit Judge Medina clearly stated:

" * * * We also hold, as matter of federal law, (1) that the agreement and rights arising therefrom were not necessarily terminated by the consolidation. * * *"
(R. 90)

Again, later in its opinion, the Court made this clearer:

" * * * Did the consolidation abruptly terminate the collective bargaining agreement and the rights of the Union and the employees created or arising thereunder?

We think it clear and we decide and hold that the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements (*Textile Workers Union v. Lincoln Mills, supra*, at 453-4; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 1960, 363 U. S. 574, 578; *Local 174, Teamsters Union v. Lucas Flour Co., supra*, at 105; *Drake Bakeries Inc. v. Local 50*, 1962, 370 U. S. 254, 263) can be fostered and sustained only by answering this question in the negative. * * * (R. 93)

A bit further on in its opinion:

"* * * we do hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement, * * *" (R. 93)

And still further:

"* * * Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract." (R. 94)

Besides these specific excerpts from the decision hereinabove quoted, the Court of Appeals' entire opinion is devoted to a discussion of the distinction between substantive arbitrability and procedural arbitrability and throughout its opinion, the Court recognized that substantive arbitrability

is for the court but that procedural arbitrability is for the arbitrator. The Court's opinion shows a complete awareness that the existence of a promise to arbitrate is a question of substantive arbitrability and it holds in favor of the Union on this question of substantive arbitrability. There is nothing on this aspect left for the arbitrator to pass upon.

The opinion of Circuit Judge Kaufman, as a concurring opinion, cannot be interpreted in any way contrary to the Court's opinion, and must be read so as to make it consistent with the majority opinion. Thus, the concurring opinion must be found to hold that the Union may proceed to arbitration against Wiley under the contract.

Notwithstanding the ruling of the Court of Appeals that Section 90 of the New York Stock Corporation Law is not controlling (R. 92), the Union respectfully maintains, that that Section is binding upon the Federal Court. The language of the statute is so broad and extensive that it must be deemed to cover "any liability or obligation", including the obligations under a collective bargaining agreement.¹

A collective bargaining agreement is a contract binding upon both parties until terminated by the law. See, *In the Matter of Klaber Brothers, Inc.*, 173 F. Supp. 83 (S. D. N. Y. 1959); *Barth v. Addie Co.*, 271 N. Y. 31 (1936); *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959); *Hudak v. Hornell Industries*, 304 N. Y. 207, 106 N. E. 2d 609 (1952); *McDonough v. Smith*, 43 CCH L. C. ¶ 40,414 (Calif. Super. Ct. 1961), (no official citation).

The effect of Section 90 is merely to bring about a change in the corporate stock structure, and in this way may be analogized to any other situation where stock ownership has changed. Corporate obligations still continue unchanged.

This is also the law of the National Labor Relations Board. See, e.g., *Cast Metal Co.*, Case No. 4-RC-69, 22 LRRM

¹ See: Fletcher, *Cyclopedia Corporations* (Perm. Ed. 1961 Revised Vol.), Sec. 7086, p. 108, Sec. 7109, p. 152, et seq.; Williston *Contracts*, (Vol. 6, rev. ed.), Sec. 1960, p. 5502.

51 (1948); *Dunkirk Broadcasting Corp.*, 120 NLRB 196 (1958); *National Supply Co.*, 16 NLRB 304 (1939); *In the Matter of Andrew Jergens Co.*, 43 NLRB 457 (1942); *Auto-part Mfg. Co.*, 91 NLRB 80 (1950), suppl'd 92 NLRB 120 (1950); *Hoppes Mfg. Co.*, 74 NLRB 853 (1947), enf'd 170 F. 2d 962 (6th Cir. 1948).

While ordinary state decisional law cannot control Federal Courts in suits under Section 301, statutory mergers under state merger statutes must be controlled by the New York statute. In any event, be this as it may, the Court of Appeals dealt with this point as a matter of Federal law, and said it must answer in the negative the question of whether the consolidation terminated the contract and the rights of the Union and employees created or arising thereunder (R. 93).

The Petitioner cannot dilute the importance of this holding by the Court of Appeals by making the contention that what is of basic importance is whether the bargaining unit continues in existence and, whether the employer's enterprise, regardless of its ownership, remains basically the same (Pet. Br. 27). This contention was urged upon and rejected by the Court of Appeals. The Court of Appeals pointed out, quite correctly, that the issue in this case was of the binding character and the meaning of contractual rights under a pre-existing agreement (Fn. 3, R. 95). The Petitioner can point to no case holding that a pre-existing contract is annulled by reason of consolidation. This was recognized by the Court of Appeals as being the essential problem of this case.

The cases relied upon by the Petitioner at this point are readily distinguishable. In *Livingston v. Gindoff Textile Corp.*, 191 F. Supp. 135 (S. D. N. Y. 1961), the Union was seeking to hold a brand new corporation formed by certain minority stockholders of a dissolved corporation with which the Union had contracted. This is a far cry from releasing a survivor corporation, consolidated with the contracting corporation, from contractual liability.

Administrative Decision of General Counsel, Case No. SR-1880, 50 LRRM 1078, 1962 OCH NLRB ¶ 11,208, cited by the Petitioner (Pet. Br. 28) also demonstrates the complete error of Petitioner's argument. In that case, one company had sold its plant to another independent company, and of course the second new company was held not to be obligated by the contract of the former employer.

In *Administrative Decision of General Counsel* Case No. K-313, 37 LRRM 1457 (1956), the same situation is revealed. A new company took over the physical assets of the old contracting company and the General Counsel of the National Labor Relations Board held that the new company was not bound by the contract of the old company.

The *Administrative Decision of General Counsel*, Case No. K-64, 36 LRRM 1521 (1955), is to the same effect.

The other cases relied upon by Petitioner, as to whether a successor employer is required to assume its vendor's obligation to bargain with a recently certified union, simply have no relevance to this case, involving as it does the issue of an existing contract. A duty to bargain may not necessarily follow the transplanting of one group of employees into another and larger group, where that duty is sought to be enforced before the National Labor Relations Board; but where there is merely a change in the ownership of stock either by a purchase of the stock or by a merger or consolidation, then the contractual rights under existing agreements continue unchanged.²

Petitioner's reliance on these cases conclusively demonstrates the inherent weakness in its entire case.

Of course, all these contentions may be advanced before the Arbitrator and a real record made of the underlying facts as to appropriate bargaining unit. See *Smith v. Evening News Ass'n*, 371 U. S. 195 (1962); *Carey v. General*

² See, *Fletcher Cyclopedia Corporation and Williston, Contracts*, fn. 1, p. 17.

Electric Co., 315 F. 2d 499 (2d Cir. 1963), cert. denied, — U. S.; — 47 CCH Lab. Cas. ¶18,151; *I. U. E. v. Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963).

It should be remembered that Wiley has no union and none of its employees is represented by a union (Pet. Br. 5). It should also be remembered, as stated by the Court of Appeals (R. 94), that Wiley was aware of Interscience's contract with the Union (R. 74).

There are impelling reasons to follow the rule of the Court below that a pre-existing contract continues binding notwithstanding merger or consolidation and these reasons are fully discussed and form the entire basis of the Court of Appeals' decisions.³ The Court of Appeals relied upon the decisions of this Court to establish Federal Common Law. The Federal law, established with reference to arbitral procedures, can be enforced and sustained only by holding that a contract continues notwithstanding a purchase of stock or a stock consolidation (R. 93).

The Court of Appeals relied upon *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U. S. 95, 105 (1962); *Drake Bakeries Inc. v. Local 50*, 370 U. S. 254, 263 (1962). Any other result in this day and age of frequent mergers and consolidations and reorganizations would result in labor relations chaos and would virtually undermine the sacredness and validity of collective bargaining agreements.

The Union submits that "stock deals" involving the transfer or merger of the stock of the contracting industry or

³ Cf. *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Co.*, — Fed. 2d — (8th Cir., 1963) 46 CCH Lab. Cas. ¶18,125 and Section 5 (2) (f) of the Interstate Commerce Act mandating the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected by a merger." For four years thereafter the employees cannot be "in a worse position with respect to their employment."

business normally presents no great problem as to the continuation of the collective bargaining agreement, and the Court, in this case, should affirm the Court below which so held. Even if this were not a "stock deal" but an "assets deal," involving the transfer or sale of the physical assets of a business, there is sufficient authority for holding that the collective bargaining agreement still continues to be binding. See cases cited, *supra*, at pps. 17-18; also, *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U. S. 574 (1960); see also pp. 26, 27 of Petitioner's Brief. The Union contract is more than a contract this Court has informed us. It is a way of life for the employees and transfer of even only physical assets should carry with it the code of governing the whole employment relationship.

POINT II

The issues tendered by the Union for arbitration are arbitrable.

No better discussion of the arbitrability of the issues tendered by the Union can be found than in the learned opinion of the Court below (R. 97).

The Court below correctly held: it is not the function of the Court to express any opinion as to the nature of, and proper remedy for implementing the rights, of seniority, job security, pension pay, grievance procedure, and vacation and severance pay, and cited as authority *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 567-9 (1960) (R. 98).

Indeed, Congress itself in Section 203(d) of the Labor Management Relations Act of 1947 has mandated that:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable

method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Section 16.0 of Article XVI of the Union contract provides for arbitration of:

"Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, * * * " (R. 27)

This broadest of all arbitration clauses clearly, within the spirit of the *Steelworkers* decisions, *supra*, renders the issues arbitrable.

Surely, questions of severance pay, seniority, job security, pension contributions, grievance procedure and vacation pay by any definition, come within the scope of the contract.

As the Court of Appeals said, specifically referring to these issues:

"* * * even if such claim is wrong or even untenable or frivolous, this does not bar arbitration. *United Steelworkers v. American Mfg. Co.*, *supra*, at 568-9" (R. 100).

This reference to this Court's decision in the *American Mfg. Co.* case, *supra*, is from the opinion of Mr. Justice Douglas who stated at pages 568-9:

"* * * The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.

"* * * When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining

agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

Petitioner's chief complaint is that the Court of Appeals failed to make a critical analysis of the merits of the Union's claim. Upholding this complaint is tantamount to a reversal of this Court's rulings as to what is the function of the court in arbitration proceedings.

The primary claim of the Petitioner that the rights contained in the issues tendered by the Union do not have their roots or foundation in the Interscience contract is simply not justified.

1. Seniority rights, accruing both before and after termination of a union contract, are so clearly rooted in the contract that it is somewhat puzzling to understand the Petitioner's position to the contrary. Seniority rights are insurance that when an event does occur the service period of the employee will be taken into consideration. Merely because no event has yet occurred which would bring the security rights into operation, does not suggest the nullity of such rights at the Wiley establishment which also is, in effect, the former Interscience establishment. *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *aff'd* other grounds, 370 U. S. 530 (1962), rehearing denied, 371 U. S. 854 (1962), involved seniority rights which, of course, were rooted in the former collective bargaining agreement theretofore terminated.

2. Where the employees have been working under collective bargaining agreements under the terms of which the Company has been making contributions to a union pension plan, is it frivolous for the employees to expect that the contributions shall continue notwithstanding the termination of the contract? Is such an expectation rooted in the contract? *Zdanok v. Glidden, supra*, holds that seniority

rights are so rooted notwithstanding the termination of the contract. The "job" and "seniority rights" are a bundle of legal relations containing many attributes. "Seniority rights" or "jobs" would be valueless unless the "job" that existed prior to the termination of the contract was to continue. Nothing is more important to an employee than his pension rights which constitute a most vital attribute of the "job."

In Goodall-Sanford, Inc. v. United Textile Workers, Local 1802, 233 F. 2d 104, 110 (1st Cir. 1956), aff'd 353 U. S. 550 (1957); the Court said:

"* * * in view of the increasingly complex use of compensation in the form of 'fringe benefits', some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern."

As one management expert stated, in discussing the *Zdanok* case, *supra*:

"Another interesting point in this case is the implication that maybe something besides seniority would be found to be carried over to the new plant. At one point, the Court says, 'The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location.' Now what do 'benefits' mean? Does this mean that an employer who moves from Detroit to Lebanon, Tennessee also has to carry his wage structure with him? Presumably if one accepts the idea that seniority becomes a vested right there is no reason to pre-

vent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right." (R. 46)

If a wage rate once earned is a vested right, then surely pension payments, part of wages, may also be deemed a vested right by an arbitrator. This of course is the basic question of this case and all the Union herein seeks is the opportunity to present the facts to an arbitrator so that he may tell the Union and the employees what rights remain with the employees. The record is completely silent as to when the unit at Interscience was physically broken up and when the physical assets of Interscience and the employees physically moved over to Wiley. This is a fact which should be determined by the arbitrator since, in any event, assuming that the contract survived the merger for only this brief time with the bargaining unit intact, until the time of physical removal of employer's equipment, the doctrine of accretion could not apply. While Interscience continued operating at its old location even after the merger, once the Court determines, as did the lower court, that the contract continued, there can be little question that the rights of the employees and of the Union and under the contract continued in full force and effect. Even the Petitioner concedes this (p. 26, Pet. Br.).

In the remanded *Zdanok v. Glidden* case, 216 F. Supp. 476 (S. D. N. Y. 1963), the plaintiffs did contend that notwithstanding the termination of the contract:

" * * * the collective bargaining agreement obligated defendant to employ them at Bethlehem without loss of seniority, pension, welfare, and other rights." (p. 477)

* Eugene A. Hoffman, Labor Relations Manager, Minneapolis-Honeywell Regulator Co., in an article entitled "*Do the Seniority Rights of Employees Survive an Expired Contract?*" presented to the Industrial Relations Committee of the National Association of Manufacturers.

The defendant still continued to claim:

" . . . that under federal law, seniority and other rights cannot be held to have survived the good faith closing of the Elmhurst plant." (p. 478)

The opinion in the remanded case thus establishes that continuing pension, welfare and other rights were involved in the *Zdanok* case, *supra*, in addition to seniority rights.

3. The third issue tendered by the Union related to the continuance of the "job security and grievance provisions of the contract." By this issue the Union intended to obligate the Company to the continuation of some protection to the employees notwithstanding the merger or the termination of the contract by its terms. The Union wanted to provide the employees with some formal and binding machinery which would not leave the employees at the mercy and whim of the Petitioner. This fear was engendered by the announcement of the Company that it would discharge 25 percent of the employees on the merger (R. 63) and it was only after protests by the Union that the Company agreed to continue the employment of all the employees (R. 64). The Union insisted that the arbitrator determine whether the seniority rights of the employees could be invaded after January 31, 1962 without the Company being called upon before some authoritative body to explain its action.

4. The Company concedes (Pet. Br. 38), at least as to severance pay accruing up to January 31, 1962, arbitration could proceed as against Interscience. The Union submits that the surviving corporation, Wiley, must be made liable for such severance pay and not freed from such liability merely by virtue of the merger. Severance pay is wages and is part of "seniority rights" and the "job." Surely there is here sufficient nexus with the contract so as to enable arbitration to take place as to the continuation of accrual of such rights even after termination.

5. The same position is taken by the Union with respect to vacation pay which is again part of "seniority" and "job." It may be appropriate to point out that job security and seniority are both very closely allied. Job security consists of three elements, the first one being seniority protection against layoff and for promotion and recall. The second element in this case can be found in the 26 jobs that were guaranteed to the Union (R. 39). The third element is, that discharge must be for cause (R. 17), with grievance machinery to protect employees against improper discharges (R. 27).

The Petitioner relies heavily on the *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 298 Fed. 2d 644 (2nd Cir. 1962). This case was decided by the same Circuit Court that decided the case at bar and distinguished it on the ground that the case at bar was commenced prior to the termination date of the contract (R. 93), and that the grievances involved in the within case, as distinguished from the *Proctor & Gamble* case, arose during the life of the contract.

See also, *Piano Workers Union v. Kimball Co.*, 54 LRRM 2212 (N. D. Ill., September 13, 1963).

Of the *Steelworkers* trilogy, the *Enterprise Wheel & Car Corp.* case, *supra*, is in some aspects the most pertinent to the case at bar and incidentally, sustains the Court of Appeals' distinction of *Proctor & Gamble*, *supra*. There, the arbitration hearing itself was after the termination of the contract and, of course, the Court held that the arbitration was proper, thus effectively disposing of Petitioner's contention that the Union is not the proper party to enforce the rights of the former Interscience employees. There, as here, the grievance arose during the lifetime of the contract and involved the discharge of employees. This Court held that the award of the arbitrator in directing reinstatement notwithstanding termination of the contract was

proper and that back pay could be awarded, not only for the period during the life of the contract, but also for the period subsequent to the termination of the contract to the date of reinstatement. The dissenting opinion, while agreeing that all rights which had accrued during the term of the collective bargaining agreement could be awarded to the Union even after the termination of the contract went on to say, at pages 601-2:

" * * * But surely no rights *accrued* to the employees under the agreement after it had expired. * * * "

"But when that agreement expired, it did not continue to afford rights *in futuro* to the employees—as though still effective and governing. * * * "

"Once the contract expired, no rights continued to accrue under it to the employees. Thereafter they had no contractual right to demand that the employer continue to employ them, and a fortiori the arbitrator did not have power to order the employer to do so; nor did the arbitrator have power to order the employer to pay wages to them after the date of termination of the contract, which was also the effective date of their discharges."

The majority opinion should be read in the light of the dissenting opinion and surely is a holding to the effect that the right to reinstatement did *not* terminate notwithstanding the fact that the arbitration proceedings and the arbitrator's award came after the termination of the contract. The direction of back pay to the date of reinstatement surely is a holding, contrary to the dissenting opinion, that rights *do* accrue to employees even after the expiration of the contract and rights in future do continue to be afforded to employees after the expiration of the contract.

The majority opinion of the Supreme Court should also be read in the light of the Fourth Circuit's decision in that case, 269 2d 327 (4th Cir. 1959). The Court of Appeals in the *Enterprise Wheel & Car* case had held that the arbitrator's award for back pay, subsequent to the date of termination of the contract and the requirement for reinstatement of the discharged employees, could not be enforced. The nub of its opinion was as stated, at page 331:

" * * * collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. * * * "

It was this view that the Supreme Court reversed; so it must be concluded that the *Enterprise* case does hold that the termination of the contract does not sound the death knell of all employee rights thereunder.

Similarly, cases cited by the Court of Appeals which have recognized the possibility of "vested" rights (R. 97, fn. 4), but cavalierly disregarded by Petitioner (Pet. Br. 38, 39) will bear further study and analysis. For example, in *Botany Mills v. Textile Workers Union*, 50 N. J. Super. 18, 141 Atl. 2d 107 (1958), the Court directed enforcement of an arbitration award which had granted vacation pay to the employees. The collective bargaining agreement had terminated March 15, 1956 and the company contended that since the contract provided that the vacation pay was not payable until April 15, a layoff of the employees on the prior December 30 disentitled the employees to any vacation pay. The Arbitrator disagreed and rendered an award accordingly and it was this award that was finally enforced by the Court.

Here again the Company contended that since vacation pay was not payable until April 15, a date subsequent to the actual termination of the contract, vacation pay could not have "accrued" before such termination.

The Court said at page 29:

"* * * The rights asserted by the defendants, if they exist, indisputably arise out of the agreement. That the actual enjoyment of the rights claimed was to occur subsequent to the termination date does not make the dispute non-arbitrable. While collective bargaining agreements are normally made for fixed periods of time, they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration. It will therefore be commonplace that rights to which employees are entitled under a collective bargaining agreement may not actually fructify in enjoyment until after the expiration of a given contract period with reference to which they may be regarded as having been earned."

While the actual vacation pay in question in this case had been earned, for at least part of the time, prior to the expiration of the contract, this case, however, does furnish another example of rights fructifying in enjoyment after the expiration of the contract period. The Court went on to say:

"* * * they signify nothing more than that the parties contemplated enjoyment of the benefits on a date which, because of the unforeseen shutdown of the plant, occurred subsequent to the expiration of the contract. But we do not agree that this circumstance necessarily is preclusive of arbitration; neither general legal concepts nor doctrines more parochial to labor arbitration indicate such result." 50 N. J. Super. 18, 30.

Another example cited by the Court of Appeals (R. 97) and by the *Botany Mills* case, *supra*, is *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't. 1955); *aff'd sub nom Potoker v. Brooklyn Eagle Inc.*, 2 N. Y. 2d 553; 141 N. E. 2d 851 (1957).

A reading of the Appellate Division decision will show why the court below referred to that decision rather than to the decision by the New York State Court of Appeals. In the *Potoker* case the Court directed arbitration of the controversies claimed to exist under a collective bargaining agreement which the employer claimed had been terminated by the Union. The controversies related to overtime, holiday, vacation, severance and notice of dismissal pay and, in passing, the Court said that such claims

" * * * certainly 'arise out of or relate to' the contract which specifically prescribes arbitration as the method for determination of all disputes." (286 App. Div. at 736)

The Court held that termination was for the arbitrator to decide and the fact that the contract had been terminated did not foreclose arbitration. The Union contended that the severance pay issue "survives termination of the contract". The Court said that if the Guild could sustain its contention,

" * * * the severance pay provisions do not perish with the agreement, survive its termination, and severance pay becomes payable on expiration of employment regardless of the date of termination of the contract." (286 App. Div. at 737)

Here again the Court was talking about severance pay which became owing during the life of the contract. This case was in 1955 and the Union apparently was not asking for severance pay for any post-contract period but the point

is that the Court does say that certain rights do continue and survive termination of the contract.⁵

In *Frank Chevrolet Corp. v. Meyers* (146 N. Y. L. J., December 4, 1961), 43 CCH Lab. Cas. ¶ 50,413, aff'd 33 Misc. 2d 1057 (2d Dept. 1962), the employer sought to stay arbitration initiated by the Union because of the employer's failure to remit checkoff dues and to make contributions to the pension and health and welfare funds. The employer contended that arbitration could not be had because of the termination of the collective bargaining agreement. The Court said, at page 62,355 (43 Lab. Cas.).

" * * * In any event any claim arising after the termination of the contract goes to the merits, and such issue is properly within the province of the arbitrator. (*Matter of Potoker* [*Brooklyn Eagle*], 286 App. Div. 733 [29 LC ¶ 69,618], aff'd 2 N. Y. 2d

⁵ That such rights, and the issues tendered by the Union herein, are worthy of serious consideration, reference need only be made to the labor negotiations between *General Electric Company* and the *International Union of Electrical Workers* where the company, sought and had included in the arbitration clause, the point that only express violations of specific contract language, would be arbitrable. It had announced that this was a strike issue and was the most serious block to the peaceful settlement of its labor problems. 53 LRR 340; 54 LRR 41, 97, 118. Embraced within the implied issues would certainly be the issues tendered by the Union herein and if these giants of management and labor were willing to come to the breaking point because of these differences surely it can be contended in the case at Bar that the Interscience contract permits arbitration as directed by the Court of Appeals. The Union has filed unfair labor practice charges because of the company's refusal to grant a wider arbitration clause.

Of course, before the National Labor Relations Board, a union continues to have substantial rights, even after termination of the contract. Unilateral action by the employer, following expiration of a contract would be prohibited by the Board. Thus, when a company unilaterally deprived the union representatives of seniority rights and declined to process grievances, the Board held that this constituted a violation of Section 8(a)(5) of the National Labor Relations Act. The Board said that this prohibition against the company extended to "any existing wage rate or term or condition of employment, no mat-

553 [32 LC ¶ 70,680]; *Matter of Acme Baking Corp.* [District 65], 2 App. Div. 2d 61 [LC ¶ 70,074], *aff'd* 2 N. Y. 2d 963 [32 LC ¶ 70,781]; *Matter of Teschner* [Livingston], *supra*.) 'The mere circumstance, however, that a contract has been terminated does not foreclose the arbitration of issues which arise out of and relate to it.' (*Matter of Potoker* [Brooklyn Eagle], *supra*, page 736 [29 LC ¶ 69,618]; *Application of Gottfried Oppenheimer, Inc.*, 140 N. Y. S. 2d 521 [27 LC ¶ 69,134]). 'The duty to arbitrate a dispute arising during the term of the agreement survives the expiration thereof.' (*Matter of International Association of Machinists, AFL-CIO, Lodge 2116* [Buffalo Eclipse Corp.], 12 App. Div. 2d 875 [42 LC ¶ 50,194].) An arbitration will be ordered even though it is claimed that the contract was cancelled by the act of the parties. (*Matter of Aqua Mfg. Co., Inc.* [Warshaw & Sons, Inc.], 179 Misc. 949.)

ter how established * * * *Bethlehem Steel Company*, 136 NLRB 1501, 1503 (1962) "Enf. den'd on other gr'ds. — F 2d —, 53 LRRM 2878 (3rd Cir., 1963); see also, Trial Examiner's Report, *Body & Tank Corp.*, 2 CA 9116 (not reported). Surely, if the Board finds that such rights continue even after the termination of the contract, there is enough substance in the Union's issues in the case at Bar to justify an inquiry by the Arbitrator into the nature and extent of such rights.

In the *Bethlehem Steel Company* case in the 3rd Circuit, *supra*, the Court held that contentions by the company that it was relieved of any obligation to bargain because the union's demands covered an inappropriate unit were "not tenable" citing *Brewery & Beverage Drivers & Workers Local 67 v. NLRB* (C. A. D. C. 1958), 257 F. (2d) 194.

In the *Brewery & Beverage Workers* case, *supra*, the Court held that the company was not relieved from its duty to bargain notwithstanding a variance between the unit sought by the union and the unit later found by the Board to be appropriate where the variance was "not substantial." What is "substantial" must be determined either by an Arbitrator or by the Board and not by a unilateral act of any employer.

The Court makes it clear that the checkoff dues and the health and welfare contributions were moneys claimed by the Union to have accrued after the alleged termination of the contract. Yet the Court concludes that the claims "arise out of" and "relate to" the contract.

In *Piano Workers Union v. Kimball Co.*, 54 LLRM 2212 (N. D. Ill., Sept. 13, 1963), *supra*, p. 27, the question was whether failure to rehire former employees at a new plant opened after the termination of the collective bargaining agreement, was an arbitrable issue and the Court held that it was, saying:

"As in the case of pension rights and retirement benefits, seniority rights extend into the future. Are these rights, which are often referred to as 'vested rights' (though perhaps improperly so), and which arise out of the terms of a union agreement to be honored only so long as the *whole* of the agreement is enforceable? Are these rights to be held for naught thereafter? *Zdanok v. Glidden Company*, 288 F. 2d 99, answers these questions in the negative."

The foregoing cases are submitted by Respondent, not with any claim that they are binding precedents conclusively supporting the Respondent's position on the merits of the arbitration issues, but rather they all cited to show the thinking of the courts and the National Labor Relations Board that rights do survive and continue after the termination of contracts. This discussion has been engaged in to demonstrate that the rights which do continue after the termination of a collective bargaining agreement are worthy of serious consideration by the Court and by an Arbitrator. Admittedly, this is a pioneer field and it is just this kind of a case where the expertise of an arbitrator is required.

In deciding the questions involved in this case, the Union respectfully suggests that the Court should give the utmost

consideration to the important and urgent moral, humane and sociological problems herein involved. A single glance at the schedule of comparative pensions under the Wiley plan and under the Union plan quickly highlights the difference in pension dollars payable to the employees under the two plans. By and large the pensions under the Union plan are vastly superior—in some cases almost double those paid under the Wiley plan (R. 49).

Only a moment's reflection will be sufficient to show the tremendous importance of this issue to a pensioner arriving at the age of 65. Under the Wiley plan the pensioner would find it impossible to make ends meet; while under the Union plan a modicum of comfort may be realized. Of course, this comparison is based upon the hope that the Wiley plan will be continued.

Moreover, what about the pension rights which have been earned as deferred wages prior to the termination—a question which Wiley has ignored entirely, except insofar as it has given the employees, for the moment at any rate, the coverage of its own plan.

Similar reflections with respect to severance pay would show the tremendous impact upon the employees by the Company's refusal to make any commitments concerning severance pay, not only with respect to those amounts which accrued prior to termination but those coming due after termination. This Court does not need to be reminded of the importance of severance pay in the life of an employee and the bargaining which goes on between union and employer to achieve this point of security (see R. 33, 41). Substantial amounts of severance pay have accrued to and have been earned by the employees; in some cases being in excess of \$700—and to deprive the employees of a remedy with respect to such sums is unjust and contrary to law. Other employees who have not yet reached the maximum in sever-

ance pay, but who have been employed at Interscience for many years under the expectation and umbrella of severance pay should not be denied the right to have this security continued notwithstanding termination of the contract. Just as in the case of pension contributions the employees and their collective bargaining agent gave up a present *quid pro quo* for the security of future severance payments and in the expectation of the full maturity of these rights.

Similar other considerations go with the Union's insistence upon protection with respect to seniority, grievance machinery and vacations. Where employees have earned vacations by seniority, it is only fair and proper that these rights be continued and that they continue to improve notwithstanding termination of the contract (see R. 15, 20).

Several of the employees in this case are near retirement age. Others will be there shortly (R. 41). At the Employer's whim, such employees could now be cast adrift prior to retirement as this Employer threatened to do in earlier negotiations with the Union (R. 59, 64). Thus, after years of service, these older employees would face the grim necessity of starting life anew at the age of 61 and above.

Of course, these problems are not confined to the Wiley employees. All over the country we have plant closings, plant removals, mergers, consolidations, transfers and other similar business reorganizations. Contrasted with higher echelons employees, who are normally well provided for, thousands of rank and file employees are continuously being gravely affected by such upheavals and to deprive these employees of an avenue of remedy by an arbitrator would be cruel and inhuman treatment of the affected workers of this country. Such a result would

“ * * * involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would

be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation." (Opinion of Judge Medina, R. 93.)

Contrary to the claims, therefore, of the Company that the rights claimed by the Union on their face do not have any legal foundation in the Union contract (Pet. Br. 34), the facts and the law indicate quite clearly that the Union claims are verified in the Union's contract. As Judge Medina said:

" . . . the very fact that in the instant case we are presented with such difficult issues in a new and important field as yet largely unexplored, is ample reason why we must, as we do, leave the merits to the arbitrator whose creative role in the interpretation of collective bargaining agreements has been well remarked upon. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, *supra*, at 578-81; *Dox, Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1490-93 (1959)." (R. 98, fn. 5)

POINT III

The Union is the proper party to enforce the rights of the former Interscience employees.

We have already alluded to the *Enterprise Wheel and Car Corp.* case, *supra*, as conclusive authority of the proposition that the Union is the proper party. This was the holding of the Court of Appeals (R. 96).

Any final doubt on this score is removed by this Court's decision in *Retail Clerks v. Lion Dry Goods*, 369 U. S. 17 (1962), where this Court held that a union could sue to enforce a strike settlement agreement even though the union

was not entitled to recognition as exclusive representative of the employees of the companies involved in the litigation. The Court, in referring to "members only" contracts, held that the union had status even if it were a minority union. This case strongly reinforces the position of the Union that, regardless of the merger or any alleged change in the appropriate bargaining unit, the pre-existing contract continued and the Union's status to enforce that contract was not affected.

The Petitioner bases its argument on this point on the assertion that the Interscience bargaining unit had disappeared and was integrated into the larger bargaining unit of the Wiley employees (Pet. Br. 45).

As heretofore stated at page 5, there is no proof of these facts in the record and it is essential, as a reading of the Board cases cited by the Petitioner will demonstrate, that in an appropriate proceeding the Board examine the detailed facts before arriving at any such conclusion. There has been neither such proceeding nor such investigation before any forum.

The unit issue has never been litigated for the simple reason that this is not the place nor the time to do so and this point was made by the Court of Appeals (R. 95, 96). An examination of the cases relied upon by the Petitioner will show this to be true and, by showing it to be true, will demonstrate the weakness of the Petitioner's contentions. *L. B. Spears & Company*, 106 NLRB 687 (1953), cited at page 45 of Petitioner's brief, was a representation proceeding before the National Labor Relations Board. The question was: whether two corporations constitute a single employer under the National Labor Relations Act. The Board, after examining all the facts, so held and found that the collective bargaining agreement of one of the corporations was not a bar to the representation proceedings.

Hooker Electrochemical Company, 116 NLRB 1393 (1956), was likewise a representation case under the National Labor Relations Act and here again the Board went into the detailed facts of the results of the consolidation.

In *Retail Clerks v. Montgomery Ward & Co.*, — F.2 —, 47 COH Lab. Cas., ¶ 18,232 (7th Cir. 1963), the Union had been decertified in a proper proceeding.

The other decisions relied on by Petitioner at page 46 are properly distinguished by the Court of Appeals (R. 96). All of these cases demonstrate the basic invalidity of Petitioner's entire case.

POINT IV

Procedural arbitrability is for the arbitrator.

The Petitioner seeks to clothe the question of whether procedural arbitrability is for the Court or for the Arbitrator with special gravity, by designating procedural arbitrability as "conditions precedent", a description not used by the Court of Appeals. The opinion below gives valid reasons as to why procedural arbitrability should be for the arbitrator (R. 104). The chief reason is based upon this Court's decisions in the *Steelworkers* case that the bargain of the parties for a determination by the Arbitrator of the issues between them should be executed. Also emphasized by the Court of Appeals is the spirit of the arbitration processes and the delays that would ensue if the Court were to pass on these questions.

The Court of Appeals also felt that it was possible for the Arbitrator to find that there was substantial compliance by the Union. While the Petitioner still disagrees with this conclusion, this is a matter which it bargained for and should be interpreted by the Arbitrator.

Wiley's plea that it changed its position because the Union failed to invoke arbitration procedures is not borne out by anything in the record. As early as June 27, 1961, the Company was advised as to the Union's position and any acts of the Petitioner thereafter were at its own risk (R. 57, 68).

Some cases, in addition to those cited by the Petitioner (Pet. Br. 53) holding that procedural matters are for the arbitrator are: *Local Union No. 46, International Union of the United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America v. Bevington & Basile Wholesalers, Inc.*, 213 F. Supp. 437 (W. D. Mo. W. D. 1963); *Carey v. General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963); *I. U. E. v. Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963); *Larsen v. American Airlines, Inc.*, 313 F. 2d 599 (2d Cir. 1963).

Because of Petitioner's request that the Court direct affirmance of the District Court's decision (R. 57), it may be appropriate to discuss the merits of the District Court's decision that arbitration was barred because of failure to comply with the grievance machinery.

The decision of the District Court is based upon the alleged failure of the Union to comply with the grievance machinery steps as set forth in the contract. The District Court refused to find any estoppel on the part of the Petitioner or any waiver by it of the grievance machinery steps.

To insist upon strict compliance with the grievance machinery procedures as set forth in the contract would defeat the intention of the parties, exalt form over substance, and perpetrate a gross injustice on the Union and the employees. After all, it was the Company which initiated the conferences at the level of the attorneys, and it was the Company which carried on these negotiations through its counsel and Vice President and Treasurer, Mr. Lobdell (R. 58, 62).

The facts show that throughout the negotiations, which consisted of more than six meetings with its counsel present—the issues were thoroughly and exhaustively gone into. Hence it must be, as a matter of fairness and equity, that the Company is estopped from raising the alleged non-compliance with the grievance machinery clauses in the contract.

The entire attitude of the Company, throughout the lengthy discussions which ensued, unwaveringly and adamantly adhered to by its counsel, shows that it would have been utterly futile—and a little bit ridiculous to follow the grievance steps as set forth in the contract. After all, contracts are entered into to carry out the intention of the parties, and as Judge Learned Hand commented, with respect to a statute—the surest way to misread a statute is to read it literally.

The Company's affidavits tell us that throughout the negotiations the Company insisted upon a single position—namely that there was no contract and that there was no Union (R. 58). Now it asserts that the “no-union” should have complied with the “no-contract.” In fact, the Company would not even consider sitting down to discuss the problems without first stating that the discussions were not to be deemed a recognition of the Union or a recognition of the contract. The Company cannot have it both ways.

Fortunately, the cases support the views of the Union.

We start out at the outset with the leading case in the Court of Appeals in the State of New York, *River Brand Rice Mills v. Latrobe Brewing Company*, 305 N. Y. 36, 110 N. E. 2d 545 (1953), where the Court said (at p. 41):

“It may be that, upon a proper showing, the portion of the agreement containing the time limitation: ‘Any demand for arbitration must be made within five days after tender’, would be held to be so am-

biguous or so unreasonably harsh, when applied to facts such as those presented here as to be unenforceable."

See also: *Matter of Tuttmann*, 274 App. Div. 395 (1st Dept. 1948); *Matter of Raphael*, 274 App. Div. 625 (1st Dept. 1949); *Barr & Co. v. Municipal Housing Authority*, 86 N. Y. S. 2d 765 (West. Co. 1949), aff'd 276 App. Div. 981 (2nd Dept. 1950); *W. S. Ponton, Inc.* (Spec. 1, N. Y. Co. 1950), 101 N. Y. S. 2d 609, aff'd 102 N. Y. S. 2d 445 (1st Dept. 1951); *Application of Roselle Fabrics, Inc.*, 108 N. Y. S. 2d 921 (Spec. 1, N. Y. Co. 1951), aff'd 113 N. Y. S. 2d 280 (1st Dept. 1952).

In *Teschner v. Livingston*, 285 App. Div. 435 (1st Dept. 1955), aff'd 309 N. Y. 972, 132 N. E. 2d 333 (1956), the court said:

"The clause relied on for the claim that the demand for arbitration was untimely does not appear to have been intended for a situation such as that here presented, especially since the movant could not have been prejudiced in the slightest by the short delay * * *. Literal compliance would obviously be impossible, * * *." (Emphasis supplied.)

See also: *Local Union 516 v. Bell Aircraft Corp.*, 283 App. Div. 180, 127 N. Y. S. 2d 166 (4th Dept. 1954).

In *Insurance Agents v. Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa. 1954), the company also contended that the failure of the union to give a certain notice barred the action by the union to compel arbitration. The Court said:

"The issue here does not involve the validity of the contract per se as its existence and the basic substantive arbitrable dispute revolving around the hir-

ing and firing of Merchant are admitted, nor can it be disputed that such basic substantive dispute is arbitrable under Article XXV. Thus, this is an action brought under a Federal statute and involves the matter of compliance with grievance and arbitration clauses of a valid contract. The dispute here unquestionably, involves substantive rights of the parties which are arbitrable. However, while plaintiff, on the one hand, insists that it complied with the time requirements of Article XXIV, defendant, on the other hand, insists that plaintiff's notice of dissatisfaction was two days late, an obviously procedural complaint."

The Court then went on to quote with approval from a Pennsylvania Supreme Court decision as follows:

" * * * The grievance, however, is one contemplated by the agreement between the parties and therefore it is for the arbitrator to determine not only the substantive rights of the parties, but compliance with the proper procedural steps as well, since the procedure is also fixed by the agreement and there is a dispute over the interpretation of the agreement in that respect."

In *Greenstone v. Amusement Clerks*, 8 Misc. 2d 1045, 166 N. Y. S. 2d 858 (Spec. I, N. Y. Co. 1957), the court overruled a motion of the company to stay arbitration where the company complained that the union had not exhausted a grievance procedure. The court held:

"The position she now urges that there should have been a request by respondent for negotiation is clearly sham and raised for no other purpose than to try to prevent the respondent from enforcing its right under the contract. Had there been a true desire to

negotiate, the petitioner could have availed herself of the arbitration provisions in the collective bargaining agreement and could have requested the respondent to select a representative to negotiate.

"To permit the petitioner, at this late stage, to delay and hamper arbitration by requiring the representatives of the parties to meet in an attempt to resolve the disputes between the parties would defeat the very purpose of the arbitration clause in the agreement. This court will not require any party to a contract to make useless and idle gestures in fulfillment of the terms of the contract when the conduct of one of the parties clearly indicates neither an intention of compliance with the contract nor even recognition of being bound by the contract itself." 8 Misc. 2d at 1047, 166 N. Y. S. 2d at 860-1.

In *Arsenault v. General Electric Co.*, 21 Conn. Sup. 98, 145 A. 2d 137 (1958), rearg. denied, 147 Conn. 130, 157 A. 2d 918 (1960), cert. denied 364 U. S. 815 (1960), the company objected to arbitration on the ground, *inter alia*, of the failure by the plaintiffs, discharged employees, to comply with the three steps set forth in the grievance procedure. The Court referred to the fact that at an early meeting the company had told employees that their discharges would stand and that it would be useless for them to proceed with arbitration because the company's position was "final" and not subject to change. The Court said that employees were entitled to take the company at its word and thus its present position; that the employees had failed to go on with the grievance procedure, was completely defective.

Roto Supply Sales Co. v. District 65, RWDSU, AFL-CIO, 32 OCH Lab. Cas. ¶ 70,796; 137 N. Y. L. J., p. 11 (Spec. I, Queens Co. 1957), (no official report), involved an arbitration by this Union on a discharge of an employee under a

contract similar to the one at bar. The Court ruled to similar effect when it held:

" * * * it would have been futile and respondent could not be expected to do a futile act."

when the circumstances showed that the Company did not intend to do anything about the discharges.

See also: *In re Taurone Label Company, Inc.*, 39 ECH Lab. Cas. ¶ 66,390; 143 N. Y. L. J., p. 12 (Spec. 1, N. Y. Co. 1960) (no official report).

In *Livingston v. Tel-Ant-Electronic Co.*, 4 Misc. 2d 600, 138 N. Y. S. 2d 111 (Spec. 1, N. Y. Co., 1955), rearg. den'd, 4 Misc. 2d 606, 138 N. Y. S. 2d 111, the Court said:○

" * * * It would seem quite obvious that the preliminary steps of adjustment procedure here provided for are inappropriate or impossible in a situation of this kind. In fact, the arbitration machinery was not, and perhaps should not have been, fully invoked in this situation—for it does not appear that the shop steward could possibly have any interest or duty in the matter. It may be, therefore, that, in the light of the language used in this clause, the indicated need of speed is not present in a dispute of this kind, but, rather, in those situations involving the interests of employees directly as they affect their working conditions." (4 Misc. 2d 604)

See: *Cement Workers v. Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa. 1958).

Many arbitration cases hold that where it appears that it would be fruitless to follow grievance clauses, the other party would not be allowed to raise this point as a bar to

going ahead with the arbitration proceedings. In *Evert Container Corp.*, 30 L. A. 667 (1958), a State Board of Arbitration held that the arbitration was to proceed notwithstanding alleged failure to comply with some of the grievance steps, because, it was held, this was a top level decision and discussions at a lower level would be useless.

In *Pocketbook Workers Union v. Centra Leather Goods Corp.*, 14 Misc. 2d 268, 149 N. Y. S. 2d 56 (Spec. 1, N. Y. Co., 1956) the Court likewise overlooked an alleged failure to adhere to the grievance machinery because it considered that:

"Obviously this objection lacks substance. Upon the question here involved discussion on the level suggested would be less than a formality. The contract must be read with that in mind and the obvious construction is that it does not require what would be useless."

In *Barbet Mills, Inc.*, 16 L. A. 563 (1951), the arbitrator overruled a similar contention made by the Company in that case, saying at page 565:

"Nevertheless, the adamant refusal by Superintendent Long to consider reinstatement of Swing must be deemed to have vitiated the effect of any irregularity by the Union in failing to discuss Swing's discharge with the overseer. It would obviously have been a futile thing for the Union to take the grievance back to Beck after Long had stated flatly that he would not reinstate Swing unless he was forced to do so. And Long concedes that he did not retract from his stated position in this respect at any time prior to the arbitration, even when he offered to produce the Company's evidence for the Union."

In *General Baking Co.*, 28 L. A. 621 (1957) (no official report), the arbitrator overruled a similar objection, saying at page 622,

"It does not appear that there is sound basis for the Company raising this technicality at this point as a basis for objecting to the arbitrability of the matter at hand. This opinion is substantially strengthened by the fact that, admittedly, it was the Company who initiated this matter directly with the business agent, and there is no evidence that the Company raised any procedural question when the business agent without any committee of stewards proceeded to process this matter as a grievance through discussion with the Company and through the mediation procedure of the Board."

See also, *Denver Post*, 41 L. A. 200 (1963).

There is still another line of cases which hold that where the violations are continuing, the time limitations in the contract do not control.

Thus, in *Grayson Controls*, 37 L. A. 1044 (1961), (no official report), a Board of Arbitration held, at page 1046:

"I believe that it is essential to distinguish between what Arbitrator Seward has called 'claims which arise from single isolated events and those which are based upon a continuing course of action.' As he stated, 'it would be one thing to hold that where a transaction has been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance * * * would be a bar to all future efforts to have that

course of conduct corrected.' Bethlehem Steel Co., 20 LA 87, 91-92 (1953)."

In *Suttin v. Unity Button Works, Inc.*, 144 Misc. 784, 258 N. Y. S. 863 (N. Y. Co. 1932), it was stated at page 786:

" * * * Under these circumstances, it is evident that the injury is not only continuous, but irreparable, for not only do the members of the union lose the opportunity to labor for profit, but the union loses in prestige and trade unionism in attractiveness, an injury incapable of compensation. * * * "

The proposition of a continuing violation is not novel in the field of labor relations law. The National Labor Relations Board, in interpreting its six-month Statute of Limitations within which to file unfair labor practice charges, has often had occasion to consider this question. It has consistently held that where the violation is a continuing one, the six-month statute keeps on running.

Thus, in *NLRB v. Epstein, et al.*, 203 F. 2d 482 (3rd Cir. 1953), the Court upheld the filing of a charge after the six-month period, saying at page 485:

" * * * for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects."

In *NLRB v. Gaynor News Co., Inc.*, 197 F. 2d 719 (2nd Cir. 1952), the Court similarly held with respect to certain illegal conduct, saying, at page 722:

" * * * we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer."

See also: *NLRB v. Leland-Gifford Co.*, 200 F. 2d 620 (1st Cir. 1952).

In *NLRB v. Harris, et al.*, 200 F. 2d 656 (5th Cir. 1953), the Court held that since the " . . . charge was of a continuing violation . . ." the Board had jurisdiction to consider violations subsequent to the filing of the charge.

In *Proctor & Gamble Independent Union, etc. v. Proctor & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962), "a number of technical and unsubstantial objections," Circuit Judge Medina held, were "properly brushed aside in the Court below." So, in our case at bar, this Court should brush aside the number of "technical and unsubstantial objections" interposed by the Company. Judge Medina properly relied upon the *Steelworkers* decision, *supra*, and held that arbitration should proceed, by saying, at pages 645-6:

"The nub of the matter is that under the broad and comprehensive standard labor arbitration clauses every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement"

This Court has during its last Term clearly indicated that it would cast aside a transparent contention that the magic label "arbitration" was necessary to bring a grievance determination within the *Steelworkers* doctrine. *General Drivers v. Riss & Company*, 371 U. S. 810 (1963). The same result should be ordered in this case.

The entire conduct of the Company throughout shows a waiver (R. 69, 105). The grievance machinery was intended to apply to only a small grievance affecting a single employee

and not to one affecting the entire bargaining unit (R. 69, 105).

Before the Court of Appeals, the Union took the position that the question here involved was a dispute or difference under the contract and that it would be absurd to require, under the cases, that this was a "grievance" which has to be filed with the employer and a Union shop steward (R. 105). In any event, the Union's letter of June 27, 1961 followed closely on the heels of the first notice received by the Union of the announcement of the merger (R. 57, 75, 105).

This case was unanimously decided below by Judges Medina, Smith and Kaufman. By the request for a hearing *en banc* all the judges of the Court of Appeals for the Second Circuit were involved and no active Circuit Judge requested that the case be heard *en banc*. Surely, this should be conclusive that the suit for arbitration, and the issues herein are not frivolous. Even if they were, unless the *Steelworkers* cases are to be reversed, arbitration must be directed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: October , 1963.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1963

JOHN WILEY & SONS, INC.,

v.

Respondent

DAVID LEVINSKY, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE
AND BRIEF FOR THE
AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 91

JOHN WILEY & SONS, INC.,

v.

Petitioner

DAVID LIVINGSTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of respondent, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the respondent has been obtained. The consent of the attorneys for the petitioner was requested but refused.

The AFL-CIO is a federation of labor unions, having a total membership of approximately thirteen million. Respondent in this case represents a district of an international union affiliated with the Federation.

The case involves two issues, not heretofore decided by this Court, which are of great importance to the entire labor movement. First, in what situations and to what extent does a collective bargaining agreement survive a change in the ownership or control of the business enterprise? Second,

what is the proper allocation of responsibilities between court and arbitrator when a party to a collective bargaining agreement resists arbitration on the ground that the other party has failed to comply with the agreement's procedures for processing grievances?

The parties to this action necessarily will concentrate on the peculiar facts of their case. In the brief tendered with this motion, the AFL-CIO discusses the issues in broader terms, highlighting their potential impact upon myriad related situations which recur frequently in the field of labor relations.

Respectfully submitted,

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AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

INTRODUCTION AND STATEMENT OF INTEREST

This case presents a situation which is in many respects familiar to this Court. A union claims that employees are entitled to certain rights and benefits under a collective bargaining agreement. The employer disagrees. The agreement provides a grievance and arbitration procedure "as the sole means of obtaining adjustment" of any dispute "arising out of or relating to this agreement, or its interpretation or application, or enforcement." The employer, however, refuses to submit the dispute to arbitration. By an action under Section 301 of the Labor Management Relations Act the union seeks to compel the employer to arbitrate.

The sole question presented is whether the employer is obliged to arbitrate the underlying dispute with the union. The merits of that underlying dispute are not before the Court. The union has not asked this Court—or any court—to determine whether the employees are entitled to the seniority, pension, severance-pay, vacation, and other bene-

fits which the union claims. It asks only that the question be determined in accordance with the arbitration provision of the agreement.

Since the union here claims that the employees are entitled to these benefits under the agreement, there can be no question that the underlying dispute in this case is one "arising out of or relating to this agreement, its interpretation or application." Petitioner devotes 14 pages of its brief (pp. 30-44) to arguing that the agreement does not provide for the benefits which the union seeks, and that the assertion that it does is "frivolous." This argument need not detain us, however, since this Court has already authoritatively decided that when an arbitration clause of a collective agreement provides for arbitration of disputes concerning its application and interpretation, any claim by the union that the agreement has been violated is subject to arbitration, regardless how foolish or even frivolous that claim might appear to be. *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960).

This case presents additional issues, however, which have not previously been decided by this Court, and which are of far-reaching importance to the federal labor policy.

The first issue is whether the defendant in this case, John Wiley & Sons, Inc., is bound by the agreement which the union seeks to enforce. That agreement was originally executed between the union and Interscience Publishers, Inc. During the term of the agreement, Interscience and Wiley merged, and Wiley is the surviving corporate entity. Although Wiley took over Interscience's business, and continued for a period of time to operate the Interscience plant, it takes the position that on October 2, 1961, the date of the merger, the agreement terminated, even though it would not have terminated by its terms until January 31, 1962. Some time after the corporate merger, Wiley closed the Interscience plant and physically consolidated its operations with another larger Wiley plant.

The union claims that the agreement survived the corporate merger and that Wiley became bound by it when the merger took place. It further claims that, under the agreement, employees became entitled to certain permanent economic benefits and job protections at the time the physical consolidation of the plants took place. Since Wiley refuses to acknowledge these obligations, the union seeks an order compelling Wiley to arbitrate under the grievance and arbitration procedures of the agreement.

In addition to its contention that it is in no way bound by the agreement, Wiley asserts another defense. It argues that the union lost any right which it might otherwise have had to arbitrate its claim by failing to comply with the procedural steps preceding arbitration which are prescribed in the agreement. The issue thus presented is whether, assuming Wiley is bound by the agreement, the court or an arbitrator should decide whether the union failed to comply with these procedural steps, and whether the effect of such non-compliance is forfeiture of its claim.

Each of these issues is of utmost importance to the American labor movement as a whole. The Court's decision on the first question will determine the extent to which the industrial stability which is provided by collective agreements, and the expectations of employees under those agreements, can be upset by a change in ownership or control of the enterprise to which the agreement is applicable. The Court's decision on the second question will determine whether courts or arbitrators will decide the extent to which an employer may refuse to arbitrate a grievance which would otherwise be arbitrable under a collective bargaining agreement, simply because of some procedural objection to the manner in which the grievance was presented or processed.

Because of the vital impact which the decision in this case will have upon all American unions, and indeed upon the institution of collective bargaining itself, the American Federation of Labor and Congress of Industrial Organizations files this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

I

The question of whether Wiley is subject to the collective bargaining agreement between its predecessor, Interscience, and the union must be decided in the light of the federal labor policy. Even though the application of the New York Stock Corporation Law would lead to what we regard as the correct result in this case, a decision by this Court that state corporate law rather than federal labor law is applicable would lead to incongruous results in other cases, and would be in conflict with the well-established principle that federal law governs the enforcement of labor agreements under Section 301.

A. Both courts and commentators have recognized that a collective bargaining agreement is quite different from an ordinary contract. It is a privately created code, negotiated between parties who are required to deal with each other in accordance with procedures required by the National Labor Relations Act. It regulates the industrial community for its term and binds all employees who become members of that community. Once executed, it is binding upon all employees in the bargaining unit, including those who may not have wished to be represented by the union at all, and those who are hired after the agreement is executed. It cannot, therefore, be regarded as a simple contract binding only upon those who are parties to it in the conventional common-law sense.

B. Although common principles of contract law would dictate that a simple purchaser of a business would not be bound by any contract made by the seller which the purchaser does not expressly assume, this rule should not be applied to collective bargaining agreements. Rather, the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of changes in ownership. Change in the identity of the owner should be treated no differently

than changes in the identity of employees. Both new owners and new employees should be held to accept the agreement as a condition of entering the industrial community which the agreement governs. This rule is fair to all parties and is the only one which would promote the stability and peace in industrial relations which is the objective of federal labor policy.

This does not mean, of course, that any purchaser of the assets of a business becomes bound by the collective bargaining agreement applicable to that business. The agreement attaches to the industrial community, not the physical assets as such. The question of whether the industrial community has survived a change in ownership must be resolved on the basis of all the facts and circumstances of each case, in much the same way as the NLRB determines whether a new owner is bound to recognize and bargain with the union which represented the employees prior to a change in ownership or control.

C. When a change in ownership is accomplished by a corporate merger or consolidation, or a purchase of stock, the new owner necessarily acquires the business as a whole. In that type of situation, therefore, the existing agreement should be regarded as binding on the new owner, not because he is the legal successor of the prior owner for other contracts, but because merger is a form of acquiring ownership of a business without affecting the pre-existing industrial community governed by the collective agreement.

D. The fact that, some time after the corporate merger, Wiley physically moved the former Interscience operations to another plant has no bearing on the question of whether Wiley is bound by the agreement. Wiley became bound by the agreement when it acquired the Interscience plant. The subsequent physical change in the operations raises the same question which would have been raised had Interscience itself taken that action: whether the employees are entitled to any rights and benefits under the agreement after that physical change takes place. That is a question of inter-

pretation and application of the agreement, and is to be decided by the arbitrator, not the court.

Similarly, the fact that the agreement expired on January 31, 1962—after the merger had taken place—is totally irrelevant to the question before this Court. The agreement was in effect when Wiley acquired the business, and the union claims that certain permanent rights accrued to employees before the agreement terminated. The merits of the union's claim are for the arbitrator, not the court.

Finally, the company's contention that the union lacks standing to enforce the agreement because it is no longer the bargaining agent of the employees is totally lacking in merit. The union's standing derives not from its status as statutory bargaining agent, but from an agreement which provides that disputes concerning its interpretation and application are to be resolved through arbitration between the union and the employer.

II

The question of whether the union lost whatever right it might have to arbitrate the dispute because it did not follow exactly the procedures specified in the grievance machinery is one which should be decided by the arbitrator, not the court. We urge this conclusion not as a matter of law, but as a matter of contract interpretation. It is the almost universal expectation of parties to collective agreements that procedural questions are for the arbitrator. Accordingly, this Court should construe such agreements to reach that result unless the opposite conclusion is compelled by specific language.

In determining the parties' intentions as to the tribunal for deciding procedural questions, this Court must consider the factors which would enter into the parties' choice.

The first factor to be considered is the relative competence of arbitrators and courts to pass upon procedural defenses. When a procedural defense is tendered, there are four questions which must be decided: (1) has there been a deviation

from contractual procedures; (2) is the deviation one which may be "excused"; (3) if not excused, is the consequence of the deviation to be loss of the grievance; (4) even if the grievance is lost on procedural grounds, will it effectuate application of the agreement to render an advisory opinion on the merits, to guide the parties in similar situations in the future? It is clear that the arbitrator is better qualified than the court to answer each of these questions.

The first two questions, relating to the meaning of the agreement, require a familiarity with practices at this plant, a knowledge and understanding of the way the grievance machinery is administered, and an appreciation of the role which procedures are intended to play in resolving grievances disputes.

The third and fourth questions relate to the remedy for noncompliance with procedural rules. This Court has already recognized that the arbitrator's skill and flexibility in formulating remedies are principal reasons why parties choose them, rather than courts, to settle their disputes. If courts were to resolve procedural defenses, the sole remedy for procedural noncompliance would be denial of arbitration. But, as we show, arbitrators frequently fashion other remedies which better effectuate the purposes of the agreement.

Another factor impelling parties to submit procedural disputes to their arbitrators is the slowness of the judicial procedure. The essential attribute of any grievance machinery is that it provide speedy resolution of disputes. Submission of procedural disputes to courts would bring about multiennial delays in the processing of grievances.

Actual experience demonstrates what the above-described considerations would suggest: that parties to collective bargaining agreements do in fact submit their procedural disputes to arbitrators, rather than courts. There have been literally thousands of procedural determinations by arbitrators, as compared with but a few dozen by the courts. For these reasons we urge, with Professor (now Solicitor

General) Cox, that the conventional arbitration clause—typified by the one in this case—which provides for arbitration of all questions of interpretation and application of the agreement should be construed as expressing an intention that procedural defenses to otherwise arbitrable grievances are to be determined by the arbitrator, not the courts.

ARGUMENT

I—NEITHER THE CORPORATE CONSOLIDATION OF INTERSCIENCE AND WILEY NOR THE PHYSICAL CONSOLIDATION OF THEIR PLANTS PRECLUDES ARBITRATION OF THE UNION'S CLAIM

A basic and recurring problem in the law of labor relations is the problem of determining the rights and obligations of the parties when an employer closes, sells or moves his plant, changes the nature of his business, combines separate operations into one, or changes his corporate structure. In our dynamic economy, particularly in this period of rapid technological change, events of this kind are becoming more and more common.

This case presents only one facet of the problem, in one particular factual context.

It cannot, however, be considered in a vacuum. Since this Court has held that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws," *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 456 (1957), the issues presented must be analyzed in terms of the labor relations context in which they arise, and decided in the light of the federal labor policy. And that policy cannot be determined without looking, at least out of the corner of one eye, at similar, but different situations than the one actually presented here.

For example, it is possible to decide this case against petitioner simply on the ground that Section 90 of the New York

Stock Corporation Law makes a corporation formed by consolidation liable upon the obligations of the constituent corporations "as if such consolidated corporation had itself incurred such liabilities or obligations." Although this would, we believe, produce the correct result in this case, we believe, as did the court below, that this statute is not controlling. As we shall see, to treat a collective bargaining agreement in the same way as a commercial contract would tend to lead to wholly incongruous results in other situations. "The principles determining legal rights and duties under a collective bargaining agreement should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs." Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 604 (1956).

A. The Collective Bargaining Agreement as a Regulatory Code, Governing the Industrial Community.

It is a commonplace that collective bargaining agreements are a unique legal phenomenon—not simply another form of contract. As Professor (now Solicitor General) Cox has said, "A rose is a rose is a rose." So is a collective bargaining agreement." *Id.* at 601. And Professor Clyde Summers has observed:

"The collective agreement differs as much from the common contract as Humpty Dumpty differs from a common egg. The failure of the courts to see and remember the differences causes confusion and leads them to blunder. They misconceive the relationship, hobble arbitration, and misinterpret the agreement, and defeat the intent of the parties—all because they forget they are in a world quite unlike their own." Summers, *Judicial Review of Labor Arbitration*, 2 Buff. L. Rev. 1, 17-18 (1952). See also Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Chamberlin, *Collective Bargaining and the Concept of Contract*, 48 Colum. L. Rev. 829 (1948).

To say that the collective bargaining agreement is not an ordinary contract is not to say that all principles of contract law are necessarily inapplicable, but only that they are not automatically applicable. To determine which contract principles should be applied to collective bargaining agreements and which should not, it is necessary to understand the nature and function of the collective agreement.

As this Court has acknowledged, "a collective bargaining agreement is an effort to erect a system of industrial self-government." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 580 (1960). It is a set of rules, established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act, governing the bargaining unit—the industrial community.

These rules regulate the day-to-day affairs of that community. They prescribe not only the rates of pay and other economic benefits to be provided to employees, but the times at which employees report to or leave work, the time at which they have lunch or relief breaks, the grounds upon which they may be discharged or disciplined, etc. Many of the rules established in a collective agreement govern the relationship between individual employees as well as between employees and the employer. For example, the agreement normally provides rules and procedures for determining which employees will be laid off when there is a reduction in the work force, which employee will be promoted when a vacancy occurs, which employee will have preference in selecting the period for his vacation, which shall be required to work overtime, or on the less desirable shifts, or on holidays.

Although in some aspects the collective bargaining agreement does represent an exchange of promises between the two parties—the union and employer—its primary function is to establish the rules governing the employee-employer relationship. And these rules are binding upon the employees not by virtue of principles of contract law, but by virtue

of the federal labor laws. Although it is common to describe the union as the "agent" of the employees, it is obviously not an agent in the usual sense. Once a union is selected by the majority of employees in a bargaining unit, it has authority to bind *all* employees, including those who do not wish to be represented in the establishment of the rules. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer, and any such agreement is void. *J. I. Case Co. v. NLRB*, 321 U. S. 332 (1944).

Viewed from the standpoint of conventional contract law, these conclusions make no sense. Conventional contract law is not, however, the source from which they were derived, or the standard by which they are to be judged. Rather, these principles derive from and are designed to implement the policies of the federal labor law. Their purpose is to promote industrial peace by establishing an orderly and democratic system of labor-management relations pursuant to the statutory mandate that wages, hours and working conditions be established by collective bargaining when the employees so elect.

In short, the collective bargaining agreement is not a simple contract, binding only upon those who can be said to be parties to it in the conventional, common-law sense. It is, rather, a privately created code, established by negotiation between union and management, regulating the industrial community for its term. As this Court said in the *Case* case: "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service . . . which do govern the terms of the shipper or insurer or customer relationship whenever and with whom-ever it may be established." 321 U. S. at 335.

This code, or schedule, or whatever it be called, is established pursuant to the National Labor Relations Act. It is that Act which governs and indeed requires the collective bargaining procedures by which that code is created, and which provides the legal sanctions which make it binding and enforceable. In order to determine who is bound by that code, and under what circumstances, it is necessary therefore to look not to the law of contracts, but to the principles and policies of the federal labor law.

B. Change in Ownership, Without More, Does Not Terminate the Rules Set Forth in a Collective Bargaining Agreement.

We take, first, the simplest case in which the question in this case can arise. Does the mere fact of a change in ownership of a business enterprise terminate a collective bargaining agreement? Management and union have, through the process of bargaining, hammered out a set of rules which will govern employment for, say, 2 years. Shortly thereafter the business is sold—lock, stock and barrel. The new owner takes over everything—the physical plant, the contracts with customers, the trade name, the accounts receivable, the good will. He is carrying on the same business in the same way at the same stand. But, he specifies, he is not assuming the collective bargaining agreement.

What, under these circumstances, is the status of that agreement? Conventional contract principles would assert that it has terminated, at least insofar as it pertains to the plant that has been sold. The new owner is not a party to the contract and hence cannot be said to be bound. And this is, in fact, what the courts which had occasion to consider the question have generally held.¹ But see *Polauer v.*

¹ *Gold v. Gibbons*, 178 Cal. App. 2d 517 (1960); *Tarr v. Street Ry. Employees*, 73 Ida. 223, 250 P. 2d 904 (1952); *Robertson v. Midland Windsor, Inc.*, 116 N. Y. S. 2d 544 (Sup. Ct. 1952); *International Ass'n of Machinists v. Falstaff Brewing Co.*, 328 S. W. 2d 778 (Tex. App. 1959); *Livingston v. Gindoff Textile Corp.*, 191 F. Supp. 135 (S.D. N.Y. 1961); *In re Livingston*, 223 N. Y. S. 2d 968 (Sup. Ct. 1961).

Gold Medal Grill, 117 N. E. 2d 62 (Ohio Com. Pleas 1951). Of course, if the transfer of ownership is accomplished by sale of the stock of the contracting company—as is often the case—the result would be different. Since the contracting entity remains, there is “privity of contract” and the collective bargaining agreement remains in effect.

It is our view that these results, indicated by conventional contract law, are nonsense in terms of the law to which reference should properly be made—the federal labor law. It is our contention that the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of any change in ownership.

It might, at first glance, appear radical to urge that a purchaser is bound by a collective bargaining agreement to which he never consented. Upon reflection, however, it becomes apparent that a collective bargaining agreement is not a consensual arrangement in the way that other agreements are. When an employer hires its employees, he is prohibited by law from selecting them on the basis of their membership or nonmembership in a labor organization. National Labor Relations Act §8(a)(3), 29 U.S.C. §158 (a)(3). Thus, he cannot avoid entering into the agreement by careful selection of his employees. And when a union demonstrates that it represents a majority of those employees, the employer has no choice as to whether or not to negotiate with that union. He is required by law not only to meet with and talk to the union, but to make a sincere effort to reach an agreement. *Id.* §8(a)(5), 29 U.S.C. 158 (a)(5). See generally Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

It is thus plain that there is nothing consensual about the relationship between the parties. They are by law required to deal with each other, and to attempt to reach an

agreement. An employer may not even go out of business for the purpose of avoiding his statutory obligation to bargain with the majority representative of his employees. See *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962).

The "agreement" which emerges from this type of non-voluntary relationship cannot be termed "consensual" in the usual sense. In no other context, so far as we are aware, does the law say to private citizens, "you must sit down together and make a sincere effort to reach a *modus vivendi*, and you must reduce your agreement to writing."

It is, we believe, no more radical to hold that a purchaser of a business is bound by the agreement than it is to hold that subsequently hired employees are bound by it. Both are strangers to the agreement when made. But both should be held to accept the agreement as the rule of the community as a condition of their entrance into it. This result is, we believe, necessary if collective bargaining is to perform its statutory purpose.

It should not be assumed that this conclusion is a one-sided one. Orderly and peaceful labor relations are, after all, a benefit to the employer as well as the employees and the public. If the agreement were not binding on the new employer, it would also not be binding upon the union and the employees. A purchaser of a business would then have no assurance that the union would not seek to obtain more costly terms and conditions of employment from him than it had settled for with his predecessor. On the other hand, if the agreement automatically continues in effect, he is assured that he will be free of "labor trouble," and that he will be able to operate the business with the same labor costs as his predecessor.

But the most important consideration of all, of course, is that any other result would be destructive of the most fundamental purpose of the federal labor laws—to promote indus-

trial peace. If a change in the ownership of a business is held to have the effect of terminating the existing collective bargaining agreement, then obviously the new owner and the union must immediately proceed to negotiate a new one. It is almost inevitable, in that situation, that one party or the other will urge that the terms of the pre-existing contract be adopted as the new one. If the other party—employer or union—seeks terms more favorable to it than those which previously existed, a strike is almost inevitable. Surely a union, representing employees who are performing the same jobs in the same enterprise, is not going to submit voluntarily to a reduction in the standards which it had negotiated with the prior owner. Similarly, a new owner is not voluntarily going to agree to terms and conditions of employment more burdensome than those which the union previously accepted—and indeed by which the union would still be bound but for the fortuity of the sale.

In other words, either party would consider it outrageously unfair for the other to attempt to gain an advantage simply because of a change in ownership of the business. This reaction occurs, of course, because the collective agreement is not simply a bilateral arrangement binding only on its signatories, but a code of rules which are expected to govern the industrial community for the term of the agreement. Since this is what the agreement is in fact, this is how it should be treated in law.

Indeed, in other contexts the law does treat the agreement this way. We have already seen that the agreement is binding on all employees, even those who neither authorized the union to represent them in the first instance nor ratified the agreement after it is made. Similarly, the so-called "contract bar" rules of the NLRB also treat the agreement as a code binding for its term, by prohibiting the employees from selecting a new bargaining representative during the term

of the agreement.² This rule, which is not to be found in the statute, was promulgated by the Board in order to promote the stability in industrial relations which the Act was intended to foster.³

We submit that the federal courts should similarly promote the policies of the act, fulfill the expectations of the parties, and carry out the nature and function of collective bargaining agreements by holding that they are binding on the industrial community to which they are applicable, irrespective of changes in ownership or control. As the Sixth Circuit has said in a different but not unrelated context: "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency." *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939).

Obviously, this does not mean that any purchaser of the assets of a business becomes bound by the collective agreement. Suppose, for example, that the assets of a business are sold to an auction company, for the purpose not of operating

² Until recently, the contract-bar rule was applicable only to the first two years of the term of a collective agreement. Recently, the Board extended the bar period to three years, in order to "introduce insofar as our contract bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy." *General Cable Corp.*, 159 N.L.R.B. 1123, 1125 (1962).

³ Somewhat inconsistently, the Board has held that if a representation election is held at the end of the bar period, but during the term of an existing agreement, the agreement will not be binding upon a new representative if one is elected. *American Seating Co.*, 106 N.L.R.B. 250 (1953). It has been very ably argued, by a management attorney, that the new representative should continue to be bound by any existing collective bargaining agreement. Freidin, *The Board, the "Bar," and the Bargain*, 59 Colum. L. Rev. 61, 82 (1959).

the enterprise but dismantling it and selling the pieces on the open market. In that situation, of course, the auction company would acquire no obligations under the agreement. It has not purchased a business, it has purchased only some equipment, real estate, and other tangible assets.

There are, of course, an infinite number of possible situations which fall somewhere between these two extremes. Each case must be decided by an examination of all the facts and circumstances, in order to determine whether the industrial community has remained substantially intact, or whether the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived.

There is no litmus paper test by which this determination can be made. There is, however, a substantial body of law to which the courts may look for guidance in determining whether the industrial community has survived. This is the law which the NLRB has developed in cases involving the question of whether a new employer is obliged to recognize the pre-existing bargaining agent after a transfer of the ownership of the business. The rule which the Board has established in these cases is that "where . . . no essential attribute of the employment relationship has been changed as a result of the transfer, the certification [of a bargaining agent] continues with undiminished vitality to represent the will of the employees with respect to their choice of a bargaining agent, and the consequent obligation to bargain subsists notwithstanding the change in the legal ownership of the business enterprise." *Stonewall Cotton Mills*, 80 N.L.R.B. 325, 327 (1948). In determining whether any "essential attribute of the employment relationship has been changed as a result of the transfer," the Board has looked at all the facts and circumstances to determine whether basically the same business is being operated in

basically the same way.⁴ The theory of the Board cases is that the right of a union to be recognized as the bargaining agent of a unit of employees is in no way affected merely by a change in employers. Thus, so long as there is no other substantial change in the business except the change in ownership, the Board has held that the new owner is under the same obligation as his predecessor to bargain with the incumbent union.⁵ This is essentially the same test which, we believe, should be applied in determining whether the new owner is bound by an existing collective bargaining agreement.⁶

⁴ *Johnson Ready Mix Co.*, 142 N.L.R.B. No. 50, 53 L.R.R.M. 1068 (1963); *Downtown Bakery Corp.*, 139 N.L.R.B. 1352 (1962); *Quality Coal Corp.*, 139 N.L.R.B. 492 (1962), enforced, 53 L.R.R.M. 2559 (7th Cir. 1963); *McFarland & Hullinger*, 131 N.L.R.B. 745 (1961), enforced, 306 F. 2d 219 (10th Cir. 1962); *John Stepp's Friendly Ford, Inc.*, 141 N.L.R.B. No. 94, 52 L.R.R.M. 1434 (1963); *Elm City Broadcasting Corp.*, 116 N.L.R.B. 1670 (1956); *Butler Chemical Co.*, 116 N.L.R.B. 1041 (1956); *Lunder Shoe Corp.*, 103 N.L.R.B. 1322 (1953), enforced 211 F. 2d 284 (1st Cir. 1954); *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971 (1952); enforced sub. nom *NLRB v. Armato*, 199 F. 2d 800 (7th Cir. 1952); *Auto Ventshade, Inc.*, 123 N.L.R.B. 451 (1959), enforced, 276 F. 2d 303 (5th Cir. 1960); *Alamo White Truck Service, Inc.*, 122 N.L.R.B. 1174 (1959), reversed, 273 F. 2d 241 (5th Cir. 1959).

⁵ The issue in the Board cases, of course, is not whether the agreement survives the transfer but whether the union's representative status survives. The Board has generally taken what we believe to be the erroneous view that unless the new owner is the *alter ego* of the previous one, he is not bound by the pre-existing agreement. Compare *M. B. Farrin Lumber Co.*, 117 N.L.R.B. 575 (1957) (contract binding because transfer of ownership accomplished by sale of stock), with *Jolly Giant Lumber Co.*, 114 N.L.R.B. 413 (1955); *Southwestern Greyhound Lines Inc.*, 112 N.L.R.B. 1014 (1955); *American Concrete Pipe Inc.*, 128 N.L.R.B. 720 (1960) (holding new owner not bound by prior contract because he acquired business through purchase of assets).

⁶ We do not mean to suggest that the question of whether the union's representative status survives a change in ownership is exactly the same question as whether an existing collective bargaining agreement survives. One test which the Board applies in answering the first ques-

C. When a Change in Ownership Is Accomplished by Corporate Merger or Consolidation, or a Sale of Stock, the Industrial Community Necessarily Survives the Change, and the Collective Bargaining Agreement Therefore Continues to Apply.

When a change in ownership is accomplished by a corporate merger, consolidation, or sale of corporate stock, it is clear that that change, *in itself*, has absolutely no effect on the industrial community. The entire business enterprise is exactly the same the day after such an event as it was the day before. That being the case, the agreement is just as applicable to that enterprise ~~after the event~~ as it was before.

We thus reach the same conclusion urged by the union in this case, but by a somewhat different route. The union's argument is based on the theory that Wiley, having merged with Interscience, is under New York law the legal successor to Interscience's obligations. Under this approach, a different result would be reached if Wiley had simply purchased the assets of Interscience. Our argument, on the other hand, is that the question is not whether the new owner is a legal successor for other purposes, but whether it is the successor for collective bargaining purposes. That question is to be resolved, in our view, on the basis of determining whether the new owner has taken over the entire

tion, for example, is whether there has been any substantial change in the identity of the employees. Obviously, that question cannot itself be relevant in determining whether the agreement survives, since if the new owner is bound by the agreement he would not be permitted to replace the old employees with new ones except in accordance with the agreement.

Similarly, the Board on occasion has held that a new owner need not recognize the union because there is a basis for a good-faith doubt that the union still represents a majority of the employees. E.g., *Diamond National Corp.*, 133 N.L.R.B. 268 (1961); *Mitchell Standard Corp.*, 140 N.L.R.B. No. 44, 52 L.R.R.M. 1049 (1963). This consideration should not be a basis for permitting the new owner to avoid the existing agreement any more than it would be a basis for permitting the original owner to do so. See *Montgomery Ward & Co.*, 137 N.L.R.B. 346 (1962).

business enterprise, without affecting the industrial community to which the existing collective bargaining agreement is applicable. The significance of the fact that the two corporations merged, in that view, is that it necessarily means that Wiley took over the existing Interscience business as a whole, without any effect on the industrial community governed by the existing collective bargaining agreement.

The company in this case appears to concur in the view that a simple change in ownership, whether through a purchase of assets or a corporate merger, does not in itself affect either an existing collective bargaining relationship or an existing collective bargaining agreement. In its brief, at pp. 26-27, the company says:

"Whether the 'successor' is a successor by merger, as here, or a successor through purchase or reorganization or otherwise, is a technicality of no importance to those concerned with the bargaining unit. And those concerned with the bargaining unit, management as well as labor, are equally indifferent whether the question arises, as here, in an action to enforce a collective bargaining contract or in a representation proceeding or a proceeding to enforce bargaining rights before the National Labor Relations Board.

"What is of basic importance to the parties is whether the bargaining unit continues in existence, and if so whether the employing enterprise, regardless of its ownership, remains basically the same.

"If these conditions continue, the collective bargaining relationship and all that it implies, including the adjunctive remedy of arbitration, continues as before. If the conditions no longer exist, the collective bargaining relationship and the adjunctive remedies, including arbitration, are no longer appropriate." (Pet. Br. 26-27)

The company's essential argument thus appears to be that it was not the merger, but the physical consolidation of the plants, which had the effect of terminating the agreement. As we shall demonstrate, however, this physical change, which took place subsequent to the merger, has no bearing whatever on the issue to be decided by the Court in this case.

D. The Events Which Took Place Subsequent to the Merger Cannot Eliminate the Union's Right to Arbitrate the Claims Involved in This Case.

On October 2, 1961, "the certificate of consolidation of Wiley was actually filed in the Secretary of-State's office" (R. 55). On that date Interscience disappeared as a corporate entity and Wiley succeeded to ownership of the industrial enterprise formerly conducted by Interscience at 250 Park Avenue. So far as the record discloses, that is all that happened. The plant was not moved. There was no physical consolidation with the Wiley plant. Literally, nothing changed but the ownership and the management of the enterprise.

Wiley, nevertheless, took the position that as of 9:00 a.m. on October 2, 1961, the collective bargaining agreement terminated. It sent letters to the employees and to the union setting forth its view that both the agreement and the collective bargaining relationship with the union had ended because of the merger. This was in accordance with its position, which had previously been made clear to the union, that as of the date of the corporate merger the union would become "*functus officio*." (R. 75)

The company's attempt to justify its action on the basis of the physical integration of the Interscience and Wiley operations confuses what are, both conceptually and factually, two separate questions: (1) who is bound by the agreement, and (2) what the agreement means. The question as to whether Wiley is bound by the agreement is posed by the merger, and by the merger only. The physical integration

of the two plants gives rise to the very difficult questions which the union is seeking to arbitrate—i.e., whether the workers at the former Interscience plant have rights at the Wiley plant, and if so, what those rights are. But these questions are questions as to what the agreement means, not questions as to who is bound by the agreement. And once it is decided that Wiley is bound by the agreement, the question of what obligations, if any, it has under the agreement upon the physical integration of the two plants is a question for the arbitrator, not the court, to decide.

It happens that in this case the conceptual error is illustrated by the actual sequence of events. The company's argument implicitly assumes, as the court below seemed to assume, that the merger and the physical transfer took place at the same time. In fact, they did not. For at least some period of time after October 2, 1961, there was no physical change at Interscience: the same work was performed by the same workers at the same plant in the same way.⁷

⁷ The contrary factual assumption by the court below may have been the result of the company's conceptual confusion in argument. The opinion states (R. 90) that "on September 21, 1961, Interscience wrote its employees . . . offering jobs at the Wiley plant in New York City." This letter of September 21 was Respondent's Exhibit 5 in the trial court (R. 60, 78) but was not printed in the joint appendix in the court of appeals. It was, however, printed in the company's brief in that court. It said, in part:

"The merger . . . will take place on Monday, October 2, 1961. . . . [B]efore long, when suitable quarters have been arranged, you will change your place of work from Fifth Avenue and 28th Street to Fourth Avenue and 30th Street. Until the move, work will continue, as now, at these offices. . . . Plans for the move should be completed within a few months."

The only reference in the record to the physical consolidation of the Interscience and Wiley operations is in the affidavit of Al Turbane, the union organizer, which was filed in March, 1962 (R. 61). It appears from the discussion of the physical conditions of the work in that affidavit (R. 66) that the consolidation had taken place by that time.

This fact serves merely to emphasize what is and what is not in issue here. The only question to be decided by this Court is whether Wiley became bound to the existing collective bargaining agreement when it acquired the Interscience plant. If it did, then it was obliged to give to the employees whatever rights and benefits the agreement entitled them to. Whether the agreement provides any rights or benefits upon the physical consolidation of the plants is an entirely separate question, and is for the arbitrator, not the Court to decide.

Suppose, for example, that Interscience had purchased the Wiley plant, and then moved its operations to that plant. In that event, the union would be asking Interscience to arbitrate the very claims which it is here asking Wiley to arbitrate. There would be, under such circumstances, very difficult problems as to the continuation of employee rights upon the plant move. See *Zdanok v. Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), *affirmed*, 370 U. S. 530 (1962). But those questions would be questions of interpretation of the agreement, not questions as to who is bound by the agreement.

Surely, the parties may provide, in a collective bargaining agreement, that employees will be entitled to certain job rights, financial benefits, and other protections in the event of a consolidation of their plant with another. See *In re District 2, Marine Engineers*, 233 N. Y. S. 2d 408 (Sup. Ct. 1962). The union in this case claims that this is what the parties *did* provide in their agreement. Plainly, if that claim were being asserted against Interscience, it would be subject to arbitration. See, e.g., *Package Drivers Local 396 v. Hearst Publishing Co.*, 195 F. Supp. 180 (S.D. Calif. 1962). The arbitrator might decide that the agreement does not provide the rights which the union claims, but there can be no question that the union would be entitled to have an arbitrator's decision on that question.

It is only by confusing the question of who is bound by

the agreement with the question of what the agreement means that the company makes this case appear to be difficult. As to the first question, we have suggested that the rule should be that a new owner is bound whenever he takes over, essentially intact, an existing enterprise, or industrial community, to which the agreement applies. On this analysis, Wiley is bound by the existing collective bargaining agreement because by merging with Interscience it necessarily took over the entire enterprise as a whole. Indeed, for a period of time after the merger, Wiley continued to operate the Interscience plant. The second question, which is raised by the subsequent physical consolidation of the plants, is not whether Wiley thereby ceased to be bound by the agreement, but whether it ceased to have any continuing obligations under the agreement. That is a difficult question, but it is one which is to be resolved by the arbitrator, not the Court.

The same answer will suffice for the contention that, since the agreement expired by its terms on January 31, 1962, Wiley cannot thereafter have any continuing obligations under that agreement. The union here is seeking to enforce rights which it claims became "vested" before the expiration of the agreement. In other words, the union contends that the agreement provided certain permanent benefits to employees which the expiration of the agreement does not affect. These benefits include the right to be laid off, promoted, or recalled on the basis of seniority and to be protected by the other job-security provisions of the agreement so long as they are employed, the right to receive annual vacations in accordance with the agreement so long as they were employed, the right to continue to be covered by the "65 Security Plan" so long as they were employed, and the right to severance pay in accordance with the agreement when their employment terminates. Whether rights of this character can be said to be vested is a difficult question. Cf. *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), af-

ferred, 370 U. S. 530 (1962). The union's claim that they are vested, however, certainly raises a question concerning the interpretation and application of the agreement which is subject to arbitration even though the agreement under which the question arises has since expired.

This is not a case like *Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. denied, 374 U. S. 830 (1963) in which the union's claim that the company violated the agreement was based on the premise that the agreement had in fact not terminated. In the present case, the union concedes that the agreement has expired, but contends that the agreement entitled employees who were covered by it during its term to certain permanent rights. In principle, the case is no different than one in which a union claims that an employee was discharged in violation of the agreement during its term, and seeks to arbitrate that claim after the agreement itself has expired. In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), this Court enforced an arbitrator's award which held in effect that an employee improperly discharged during the term of the agreement had a "vested" right to be reinstated even though the agreement had since expired. Similarly, in the present case, the union claims that employees who worked under the agreement during its term thereby became entitled to certain "vested" rights which are not affected by the expiration of the agreement.

The company's argument that the union has no standing because it is no longer the statutory bargaining representative of the employees is equally without merit. The union is not asking the court to give it the status of exclusive representative of these employees. It is asking only that the court enforce the terms of an agreement which the union negotiated, and which specifically provides that disputes concerning its interpretation and application shall be resolved through arbitration between the union and the em-

ployer. That agreement would be enforceable by the union even if the union had not been the employees' exclusive bargaining agent at the time the agreement was made. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U. S. 17 (1962). *A fortiori*, it is enforceable irrespective of whether the union is currently the bargaining representative of the employees involved.

II—THE COMPANY'S "PROCEDURAL" DEFENSES SHOULD BE SUBMITTED TO THE ARBITRATOR FOR RESOLUTION

In the preceding section, we have shown that Wiley should be held bound by the Interscience collective bargaining agreement. It follows that Wiley cannot refuse to arbitrate the union's claim that employees are entitled to certain rights and benefits which accrued to them under that agreement on the ground that it is not a "party" to the agreement.

Wiley has raised another defense, however. In addition to arguing that it is not bound by the agreement at all, it argues that any right which the union might otherwise have had was forfeited by the union's alleged noncompliance with the procedural steps of the grievance procedure. As we will demonstrate, however, the question of whether the union has lost its right to a decision on the merits of its claim because of its failure to follow the specified contractual procedures is a question which should be determined not by this Court but by the arbitrator.

In the *Steelworkers* trilogy,⁴ this Court considered the allocation of responsibilities between court and arbitrator when a party sues to compel arbitration of a grievance dispute. Since arbitration is a matter of contract, it was decided that the courts, before ordering arbitration, must determine

⁴ *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

whether the particular grievance dispute is one which the parties have agreed shall be arbitrable:

"The Congress . . . has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U. S. at 582.

However, since federal labor policy encourages the settlement of labor disputes by agreed-upon arbitration machinery, the court's function is strictly confined to determining whether the subject matter of the grievance dispute is arbitrable:

"[T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.*, at 582-83.

Here, as we already have shown, the subject matters raised in the union's grievance are of the sort which are arbitrable under the agreement. The parties have surrendered all other means—economic and judicial—for settling the dispute. Thus, insofar as the subject matter is concerned, the *Steelworkers* trilogy dictates that the dispute be arbitrated.

However, the company urges, it has agreed to submit to arbitration only those grievances which have been processed in accordance with the procedural rules set forth in the con-

tract, and the Court must therefore determine whether the union has complied with those rules, just as it must determine arbitrability of the subject matter, before it can direct that arbitration proceed. Since the union, although it engaged in extensive settlement discussions with company representatives, did not do so in accordance with the literal procedures set forth in the agreement, the company urges that no court can direct arbitration.

To sustain the company's contention, this Court must decide two questions in its favor:

(1) That, contrary to the decision of the court below, questions concerning compliance with the grievance machinery under the agreement are to be resolved by the courts, rather than the arbitrator;

(2) That the union did fail to comply with the grievance machinery, that this noncompliance was not excused, and that the consequence of noncompliance is complete forfeiture of the substantive rights of the union and the individual employees.

In our view the Court need decide only the first of these questions. We believe that this Court must conclude, with the court below, that in this case the procedural questions are for the arbitrator, not the courts. We urge this conclusion not as a matter of law but, consistently with the *Steelworker* trilogy, as a matter of interpretation of the collective bargaining agreement.

We begin, as in *Warrior & Gulf*, with the proposition that parties are free to create, and commit to the courts, whatever barriers they choose to arbitration. Thus, if specific language or "the most forceful evidence of [such] purpose"²² demonstrate that the parties intended that the employer need not appear before an arbitrator absent a judicial determination of procedural defenses, the courts necessarily will

²² *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. at 585.

be drawn into an adjudication of those defenses. Contrariwise, if they explicitly provide that the judiciary shall defer to an arbitrator's disposition of such matters, that intention must be respected.

In most cases, as in this case, there is no clear indication in either direction. The question is one of construction. But as we shall show, the almost universal expectation of parties to collective bargaining agreements is that procedural questions will be determined by the arbitrator. For this reason we urge that in the absence of specific evidence that the particular parties before it had a contrary intention, the court should defer such questions to the arbitrator. Paraphrasing *Warrior & Gulf*, 363 U. S. at 582, an order to arbitrate should not be denied on procedural grounds unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that procedural defenses are to be determined by the arbitrator.

This was the view of the court below (R. 101-07).⁹ It is also the result reached by every other Circuit which has passed upon the question since the *Steelworkers* trilogy.¹⁰ The only Circuits taking a contrary view are the First and Seventh, and their decisions were rendered prior to this Court's explanation, in the *Steelworkers* trilogy, of the great scope which courts must accord labor arbitrators when the

⁹ See also, *Carey v. General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963).

¹⁰ Third Circuit: *Ass'n of Westinghouse Sal. Emp. v. Westinghouse Electric Co.*, 283 F. 2d 93, 96 (1960); *International Tel. & Tel. Corp. v. Local 400*, 286 F. 2d 329, 332 (1961); *Radio Corporation of America v. Ass'n of Professional Engineering Personnel*, 291 F. 2d 103, 110 (1961).

Fifth Circuit: *Deaton Truck Line, Inc., v. Local Union 612*, 314 F. 2d 418, 422 (1962).

Sixth Circuit: *Local 748 v. Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963).

parties have provided for arbitration of all disputes over interpretation and application of their agreement.¹⁷

In the present case, there is no evidence that the parties intended to commit resolution of "procedural" questions to the courts. Indeed, they have agreed to commit all questions concerning "interpretation or application" of the agreement to arbitration (R. 27). Accordingly, if our view of the proper rule of construction is correct, resolution of the Company's procedural defenses in this case is the arbitrator's job.

We turn now to an examination of the reasons why we believe the Court should adopt such a rule. We begin with a discussion of the purpose which is served by the grievance machinery.

A. The Nature of the Grievance Machinery.

The collective bargaining agreement is, as we have seen, a complex "code" regulating virtually every aspect of the employment relationship. It is inevitable that disputes will arise, often in great number, concerning its interpretation and application. But it is not inevitable that each such dispute be submitted to arbitration. Indeed, the system of industrial self-government created by the collective bargaining agreement could not operate if every dispute which arose were arbitrated. Arbitration is reserved for those disputes which cannot be resolved by the parties, after they have had an opportunity to consider and reconsider their positions at various levels and to make adjustments and compromises

¹⁷ *Boston Mutual Life Insurance Co. v. Insurance Agents*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers v. American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied, 363 U. S. 845 (1960). Subsequent to the *Steelworkers* trilogy a district court within the First Circuit rejected a procedural defense outright, and the First Circuit affirmed without opinion. *General Tire & Rubber Co. v. Local 512*, 191 F. Supp. 911 (D.R.I.), aff'd 294 F. 2d 957 (1961). It does not appear that the Court of Appeals in that case passed upon the continued vitality of its *Boston Mutual* decision.

where this seems preferable to arbitration. The grievance machinery is the institutional form established to facilitate this process. It succeeds to the extent that it produces voluntary settlement of disputes short of arbitration.

The traditional form of grievance procedure is a series of "steps" in which the parties discuss and try to settle their disputes at successively higher levels of responsibility. The first "step" may be totally informal, usually an oral conversation between the complaining employee and his foreman. If the dispute is not resolved at this step, it will be advanced to the next step—involving higher-level management and union representatives—and so on up the grievance ladder from step to step. The final step is arbitration.

The Interscience agreement, because it covers a relatively small and contiguous group of employees, has a simpler machinery than most. It contains only three steps: *First*, an oral conference between the affected employee, a union steward, and the employee's supervisor; *Second*, submission of a written grievance, discussed by the Union Shop Committee and an officer of the employer; and *Third*, arbitration. In larger companies, there may be as many as four or five grievance steps—involving progressively higher-level representatives of both union and management—before the final arbitration step.

Because the grievance machinery is fairly complex, and because the number of grievance disputes may be large, the parties in their agreement seek to establish procedures which will guide grievances through the steps. Thus a typical agreement will specify the manner in which grievances are to be initiated, the form of the written grievance, time limits for both parties in processing the grievance, forms for management to reply to the grievance, and so on. Similarly, different types of grievances may call for different treatment. Thus agreements frequently contain different procedures for "individual" and "group" grievances, or expedited procedures for discharge grievances (which have more volatile poten-

ARTICLE XIII. GRIEVANCES: ADJUSTMENTS OF

tialities). The number of specific procedural details in the average agreement is enormous, and the variety of details from agreement to agreement is virtually infinite.

The vast majority of grievances are processed strictly in accordance with the governing procedural rules. But sometimes one party or the other departs from some aspect of the applicable procedures. These departures may be for good reasons or bad.

Departures are sometimes the result of plain negligence. Other times, they stem from the ignorance or inexperience of the employee, or of his union representative who often is an ordinary worker in the plant. Sometimes a departure is both intentional and desirable. The procedures, after all, are means to an end: the voluntary resolution of grievance disputes. They are designed to accommodate the ordinary, day-to-day grievances. But when extraordinary disputes arise for which the procedures are not adapted, the parties address their attention to settling the dispute, not to complying with procedures inappropriate for that purpose. Thus a particularly volatile dispute may require quicker solution than the procedures would allow; or the nature of a dispute may compel immediate solution by "top level" personnel, without spending time on the lower-level grievance steps.

What happens when a party deviates from prescribed procedures? Usually, the departure is ignored, and the parties continue through their grievance machinery as though it had not occurred.¹² Occasionally, however, one party resists arbitration of a grievance on the ground that the other has departed from the procedural rules. It then becomes neces-

¹² In *American Manufacturing*, for example, there were substantial departures from procedural rules in processing the grievance. Yet the Company, though it took its "substantive arbitrability" defense to Court, never raised any "procedural" defense. Record, *Steelworkers v. American Manufacturing Co.*, October Term, 1959, No. 360, pp. 7, 20-25, 65-66.

sary to decide whether a departure has in fact occurred; whether it is a "good" or "bad" departure; and whether the consequence of the departure is to be loss of the right to arbitrate the grievance. But who is to decide these questions? That is the issue now before this Court.

In deciding whether courts should involve themselves in resolving procedural defenses, or—more precisely—whether it can reasonably be assumed that the parties to collective bargaining agreements intend them to, this Court must examine the courts' competence to do the job. Accordingly, we turn to a description of the kinds of procedural questions which arise and the considerations implicit in their resolution, and weigh the respective abilities of arbitrators and courts to decide them.

B. The Problems Which Arise Concerning Administration of the Grievance Machinery, and the Competence of the Courts to Resolve Them.

As we later demonstrate, parties usually commit their procedural disputes to their arbitrators. Therefore any understanding of the types of problems which arise, and the way they are resolved, necessarily must be acquired from a review of arbitral opinions.

The arbitrator, when a procedural defense is presented, performs a single task—his normal task—interpreting and applying the collective bargaining agreement. In performing that task, he considers four questions: (1) has there been a deviation from contractual procedures; (2) is the deviation one which may be "excused"; (3) if not excused, is the consequence of the deviation to be loss of the grievance; (4) even if the grievance is lost on procedural grounds, will it effectuate application of the agreement to render an advisory opinion on the merits, to guide the parties in similar situations in the future? We discuss each of these questions in turn.

1. *Has there been a deviation from contractual procedures?*

The first step in resolving any procedural defense is determining what the grievance machinery provides. This often is no simple matter. A few examples of the interpretive problems which arise will suggest the difficulties.

- * Did the parties intend their procedural rules to be binding, or merely "hortatory"?¹³

- * Many agreements provide that a grievance must be initiated by or on behalf of an "employee." Should a grievance be arbitrated if initiated by a former employee on leave of absence?¹⁴ A former employee who was promoted to a supervisory position and then fired from that post in a reduction in force?¹⁵ An employee who quit his job after filing the grievance?¹⁶ One who quit before filing the grievance?¹⁷ An employee who resigned in the face of a company threat to fire her?¹⁸ The widow of a deceased employee?¹⁹

- * Other agreements provide that "individual" grievances must be initiated by the affected employee, but that "general interest" grievances, or "group" grievances, or those affecting the union "as such," may be initiated by the union without the consent of the affected employee. What considerations govern the determination whether a grievance is "individual," so that it may be processed only with the af-

¹³ *Southern California Edison Co.*, 18 LA 662 (Warren); *Metropolitan Body Co.*, 15 LA 207 (Conn. St. B'd. of Arb.).

¹⁴ *Wheeling Steel Corp.*, Pike & Fischer, Steel Arbitration Digest 15:505 (Shipman) [hereinafter cited as "Steel Arb. Dig."].

¹⁵ *Tin Processing Corp.*, 16 LA 48 (Emery); *American Chain & Cable Co.*, Steel Arb. Dig. 15:505 (Valtin).

¹⁶ *Tennessee Coal & Iron Division, U. S. Steel Corp.*, Steel Arb. Dig. 15:505 (Garrett).

¹⁷ *Cf. Mead Corp.*, 19 LA 390 (Marshall) with *Hudson Tool & Machine Co.*, 21 LA 431 (Kahn).

¹⁸ *Pan American World Airways Inc.*, 18 LA 627 (Allen).

¹⁹ *United States Steel Corp.*, 34 LA 306 (Sherman).

pected employee's consent, or "general," so that it may be processed by the union without the employee's consent?²⁰

* Implicit in every agreement is an understanding that a grievance dispute, once settled, may not be reinstituted absent exceptional circumstances. Questions which arise frequently include: was there a settlement of the dispute? Did the persons who settled have authority to bind the parties?²¹ Is the scope of the settlement coterminous with the scope of the grievance?²² What circumstances would justify reinstituting the grievance?²³

* Many contracts provide that grievances must be filed within a specified time. Does the time limit start to run when the company announces an objectionable course of conduct, or when it actually initiates the conduct?²⁴ If the grievance is filed after announcement of a course of conduct, but before its initiation, is it premature?²⁵ Does the time limit run from the date of occurrence of the protested action, the date the union learns of the occurrence, the date

²⁰ *Morton Salt Co.*, 31 LA 979 (Howlett); and cases cited therein; *Champion Co.*, 24 LA 390 (Lehoczky).

²¹ *W. E. Caldwell Co.*, 28 LA 434 (Kesselman); *Stackpole Carbon Co.*, 30 LA 1028 (Brecht).

²² *American Sugar Refining Co.*, 24 LA 66 (Reynard); *Kendall Cotton Mills*, 24 LA 684 (Dworet); *Bethlehem Steel Corp.*, 30 LA 967 (Valtin).

²³ *Babcock & Wilcox Co.*, 24 LA 541 (Dworkin); *Republic Steel Corp.*, 25 LA 437 (Platt); *Lion Oil Co.*, 25 LA 549 (Reynard); *Eagle-Picher Corp.*, 27 LA 87 (Springfield).

²⁴ *Tennessee Coal, Iron & Railroad Co.*, 7 LA 378 (Blumer).

²⁵ *International Harvester Co.*, 13 LA 646 (Seward); *Timken Roller Bearing Co.*, 28 LA 259 (Stouffer); *Consolidated Vultee Aircraft Corp.*, 4 LA 24 (McCoy); *Southern California Edison Co.*, 18 LA 662 (Warren); *North American Aviation Co.*, 20 LA 789 (Komaroff); *Square D Co.*, 25 LA 225 (Prazow); *Convair*, 26 LA 622 (Komaroff).

²⁶ *International Harvester Co.*, 13 LA 646 (Seward); *Color Corp. of America*, 25 LA 644 (Lennard); *Stackpole Carbon Co.*, 30 LA 1028 (Brecht).

the affected employee learns of the occurrence, or the date the union and/or employee should have known of the occurrence?" Where the grievance objects to a "pattern" of conduct, does the time limit run from the first occurrence or the last?" How are the time limits calculated; e.g., does "5 days" mean 5 calendar days or 5 working days; does "5 working days" mean 5 days on which the plant operates, 5 days on which a substantial portion of the plant operates, 5 days on which the affected employee's department operates, or 5 days on which the affected employee's job operates?"²⁹ Are the time limits satisfied by oral presentation of the grievance, although not reduced to writing until later?"³⁰ Is timeliness measured as of the date the grievance is mailed to the company, or the date received?"³¹

It is clear that resolution of these kinds of detailed procedural questions, even more than substantive questions, requires a familiarity with practices at the plant, a knowledge and understanding of the way the grievance machinery is administered, and an appreciation of the proper role which procedures are intended to play in resolving grievance disputes.

²⁹ *International Minerals & Chemicals Co.*, 3 LA 405 (Dwyer); *Torrington Co.*, 13 LA 323 (Conn. St. Bd. of Arb.); *North American Aviation Co.*, 17 LA 715 (Komaroff); *Republic Steel Corp.*, 24 LA 141 (Platt); *Asco Manufacturing Corp.*, 24 LA 268 (Holly); *Thomas D. Richardson Co.*, 25 LA 839 (Brecht); *Dayton Malleable Iron Co.*, 27 LA 179 (Warna); *Foundry Equipment Co.*, 28 LA 333 (Vokoun).

³⁰ *Pacific Mills*, 14 LA 387 (Hepburn); *Cherry Burrell Corp.*, 17 LA 168 (Updegraff); *Republic Steel Corp.*, 27 LA 262 (Platt); *American Suppliers Inc.*, 28 LA 424 (Warna); *U. S. Rubber Co.*, 28 LA 704 (Livingood).

³¹ *Pacific Mills*, 14 LA 387 (Hepburn); *Chrysler Corp.*, 11 LA 732 (Ebeling); *Bauer Bros.*, 15 LA 318 (Klamm); *Republic Oil Refining Co.*, 15 LA 640 (Ralston).

³² *Republic Steel Corp.*, Steel Arb. Dig. 15:513 (Stashower); *American Smelting & Refining Co.*, 29 LA 262 (Roe); *Autocar Co.*, 13 LA 266 (Abernold); *Ironrite, Inc.*, 28 LA 398 (Whiting).

³³ *Jonas & Laughlin Steel Corp.*, Steel Arb. Dig. 15:515 (Cahn).

Occasionally, of course, the difficulty of the question may be camouflaged by the apparent clarity of the agreement's language. For example, consider the following "clear" provision:

"There is no responsibility on the Company to accept for adjustment or to adjust a grievance which is presented after seven (7) days from the date of the occurrence which is the basis of the grievance."

If a grievance is filed later than seven days, is the union entitled to process it to arbitration over the company's objection? The courts would be quick to say "No." Cf. *Grocery & Food Products Employees v. Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N. D. Ill. 1963). But to an industrial relations expert, this provision may have an entirely different meaning. Thus, a company official who negotiated the above-quoted provision explained its meaning as follows:

"This seven-day limitation that we have here for filing a grievance is intended primarily to push the guy into doing it faster, that's all, to keep him from sitting there and stewing on it. It is not intended in the broad sense to be a precluder or to eliminate grievances or to let a guy technically get behind the 8-ball so he can't grieve. We don't like that." (Quoted in *Southern California Edison Co.*, 18 L. A. 662, 664).

The instant case is another example of seemingly clear language which has an altogether different meaning to one familiar with industrial relations. The Interscience agreement seems to state, unequivocally, that every grievance is to be initiated by an oral conversation between the affected employee and his supervisor (R. 27). That step was wholly unsuited to this situation, of course, where the union was seeking to discuss the transfer of employees, together with their seniority and benefit credits, upon a forthcoming trans-

fer of operations from one plant to another. The supervisors obviously had no control over the problem, and the processing of separate grievances for each employee would have been a waste of time and effort. The only sensible procedure was the one followed by the union: immediately contacting top-level management, and engaging in full discussion of the problems involved. Nonetheless the district court, finding the language of the agreement clear, refused to order arbitration because "each individual employee" failed to follow "the procedures set up by the contract for resolution of those individual grievances" (R. 55).

But the agreement's meaning is not so plain as the district judge thought, and his result is at variance with the relevant arbitration decisions. For arbitrators consistently hold that the lower steps of the grievance procedure, established to deal with every-day problems, do not apply to grievances against top-level management decisions over which subordinates have no control. See, e.g., *Manion Steel Barrel Co.*, 6 L. A. 164; *Mercury Engineering Corp.*, 14 L. A. 1049; *Todd Shipyards Corp.*, 27 L. A. 153; *Evert Container Corp.*, 30 L. A. 667. As the arbitrator in *Manion* stated:

"[I]t is well recognized in the practice of industrial relations that certain disputes of a general nature . . . can only be resolved at a high union-management level . . ." (6 L. A. at 168)

The district judge's treatment of this case is understandable. He viewed the agreement as if it were the ordinary commercial contract which comes before him, and enforced its letter accordingly. He could not be expected to know the "practice of industrial relations" which guides arbitrators in solving these problems. It is precisely for that reason that parties to labor agreements look to arbitrators, not courts, for interpretation of their procedural rules, a task

which inevitably requires an appreciation and "feel" for the interests and practices involved.

"[T]he parties' objective in using the arbitration process is primarily . . . to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf*, 363 U. S. at 582.

2. Is the deviation "excused"?

Since procedural rules are merely means to an end—the settlement of grievance disputes—arbitrators have found in most agreements implicit recognition that there are valid "excuses" for literal noncompliance with procedural rules, where punishment for noncompliance would be inconsistent with the ends the procedures are intended to serve. The types of "excuses" offered for noncompliance are numerous and varied. For example:

—The company waived the defense by not raising it prior to arbitration.²²

—The company is estopped, because in the past it has permitted similar deviations without objection.²³

—The procedural rule is stated ambiguously, and the union's interpretation (though ultimately decided by

²² *McLouth Steel Corp.*, 24 LA 761, 763 (Bowles) (Procedural questions, "if not raised in prior steps, are ordinarily considered to have been waived if first presented in arbitration"); *Cherry Growers, Inc.*, 24 LA 232 (Howlett); *Kroger Co.*, 24 LA 593 (Slavney); *American Smelting & Refining Co.*, 24 LA 857 (Ross); *Flexonics Corp.*, 24 LA 869 (Klamon); *American Airlines*, 27 LA 448 (Wolff); *Ironrite, Inc.*, 28 LA 398 (Whiting); *Republic Steel Corp.*, 30 LA 301 (Platt).

²³ *Ironrite, Inc.*, 28 LA 398 (Whiting); *Lone Star Steel Co.*, 30 LA 519 (Kelliher).

the arbitrator to be wrong) was reasonable at the time.⁸⁴

—The employee was on an extended absence from the plant when the grievance should have been filed.⁸⁵

—The employee did not understand English, and did not realize he had been given a discharge notice.⁸⁶

—The company submitted an engineering report which the union could not analyze or understand within the time limits.⁸⁷

—The company representative was ill or absent on the day the grievance was due to be filed with him.⁸⁸

—The parties were inexperienced, or unfamiliar with the procedural rules.⁸⁹

—The employer violated the procedural rules, too.⁹⁰

Whether such an excuse should be accepted in a given case depends upon a delicate balancing of the several interests which inhere in the agreement: on the one hand, the desire for an effective grievance machinery; on the other hand, the desire that grievance disputes be resolved and that labor conflict be avoided, and the realization that

⁸⁴ *Bethlehem Steel Co.*, 7 LA 276 (Simkin); *Thomasville Chair Co.*, 8 LA 792 (Waynick).

⁸⁵ *Ohmer Corp.*, 5 LA 278 (Lehocz) (in Navy); *Hayes Manufacturing Corp.*, 14 LA 970 (Platt) (on layoff); *Foundry Equipment Co.*, 28 LA 333 (Vokoun) (in mental hospital).

⁸⁶ *Thomas D. Richardson Co.*, 25 LA 859 (Brecht).

⁸⁷ *Starkpole Carbon Co.*, 30 LA 1028 (Brecht).

⁸⁸ *Standard-Coosa-Thatcher Co.*, 4 LA 79 (McCoy); *Minneapolis Plastic Molders Co.*, 10 LA 570 (Rottschaefer).

⁸⁹ *Bethlehem Steel Co.*, 17 LA 7 (Selekman); *Carnegie-Illinois Steel Corp.*, 15 LA 794 (Sturges); *Smith-Haigh-Lovell Co.*, 20 LA 47 (Conn. St. Bd of Arb.).

⁹⁰ *Bethlehem Steel Co.*, 3 LA 742 (Dodd); *Anchor Rome Mills*, 9 LA 595 (Biscoe); *Bethlehem Steel Co.*, 19 LA 186 (Killingworth).

the grievance machinery is attended not by lawyers, but by workmen.

This balancing requires a familiarity and understanding of the industrial relations scene which courts simply cannot provide. One example, we believe, will suffice to demonstrate this fact.

In *Lone Star Steel Co.*, 30 L. A. 519, 2,500 employees engaged in a wildcat strike. The company purported to discharge them all, and then engaged in a series of "on again-off again" communications to the employees designed to weaken the strike and entice them back to work. The union sought to meet with the company to discuss the overall situation, but the employees, confused by the company's communications, did not seek hearings on their individual "discharges" within the time limits specified in Section 8 of the agreement. Arbitrator Kelliher excused the failure of the employees to comply with the time limits for seeking a hearing:

"This Arbitrator cannot construe the language of Section 8 in a vacuum. He must consider it in the light of the facts then existing. At no point in the [arbitration] hearing, although challenged to do so, did the company show how realistically two thousand five hundred (2,500) hearings could have been held within any reasonable period of time. This would have been a totally unrealistic solution to getting the employees back to work and producing for the company. It would have involved a time extending over several weeks or possibly months.

"... Considering all the evidence, the Arbitrator cannot find a forfeiture of seniority [i.e. employment] rights on the grounds of untimeliness" (30 L. A. at 523).

Could a court have been trusted to reach the right result on this procedural question? Would it have recognized that

the company's purported "discharge" of the employees was, at the time, really a "scare" device for "getting the employees back to work and producing for the company"? And, failing this, would it have recognized that the company, by engaging in tactics designed to confuse the employees and scare them back to work, had itself subordinated any interest in literal compliance with the grievance procedure to its overriding interest in ending the strike?

3. *What is the consequence of unexcused noncompliance with procedural rules?*

Noncompliance with procedural rules, if unexcused, is itself a "breach" of an obligation under the collective bargaining agreement. Like other breaches, an appropriate remedy is called for. But it is not at all self-evident that the remedy for every unexcused departure from procedural rules should be foreclosure of the grievance from arbitration, i.e. loss of the grievance on the merits.

It must be remembered that the union's grievance alleges that the employer has violated the agreement. The union's procedural deviation is a second, counter-breach. A solution which remedies *both* breaches best effectuates the purposes of the agreement. By contrast, a remedy which punishes the union's breach by totally absolving the employer from responsibility for *his* breach may be totally unjust in the circumstances.

For these reasons, arbitrators strive to fashion remedies which harmonize the interests of all the parties. For example, if a grievance is filed late, arbitrators frequently reduce the amount of back pay awarded, to absolve the employer of financial responsibility for such period as he might have relied to his detriment on the failure to file a grievance.⁴¹

⁴¹ *Stackpole Carbon Co.*, 30 LA 1028 (Brecht); *American Suppliers, Inc.*, 28 LA 424 (Warns); *Republic Steel Corp.*, 27 LA 262 (Platt); *Pacific Mills*, 14 LA 387 (Hepburn).

Resolution of procedural defenses by courts could have only the most unwholesome effects upon the arbitral process. For courts do not share the arbitrator's flexibility in fashioning remedies for procedural noncompliance. A court's power ends when it orders or denies arbitration. It must punish procedural deviations, if at all, by denying arbitration of the underlying grievance.⁴³ The powers at its command thus are clumsy instruments with which to accomplish the delicate balance of parties' interests required of any remedy for breach of a collective bargaining agreement.

The skill and flexibility which arbitrators can bring to bear in formulating remedies for breaches of collective bargaining agreements are principal reasons why parties choose them, rather than courts, to settle their disputes. "When an arbitrator is commissioned to interpret and apply a collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Enterprise Wheel*, 363 U. S. at 597.

4. *Should the Merits of the Grievance be decided even though the right to relief is lost due to procedural non-compliance?*

Resolution of a grievance provides not only relief to those injured by improper management action, but also an adjudication of the propriety of management's action for the guidance of the parties in the future.

It does not follow, just because the right to relief is lost through procedural noncompliance, that adjudication of the merits is foreclosed as well. The parties have contracted

⁴³ But see *Local 205 v. General Electric Co.*, 172 F. Supp. 53, 61-62 (D. Mass. 1959), in which the court, ordering arbitration despite "obvious delay" in the filing of a grievance, took upon itself the power to determine "an appropriate cut-off date" for retroactivity of back pay.

for an "interpretation" of the agreement.⁴³ That interpretation may be valuable, even though no relief will be forthcoming.

The industrial plant is a community which lives from day to day, with recurring problems. The arbitrator presented with a volatile dispute may conclude that there is a need for an interpretation, so that the parties may plan their future conduct with a fuller understanding of the "law" governing their relationship.

Certain practical considerations also underlie such action. Denial of a grievance on procedural grounds may cause unrest in the plant, for the underlying dispute remains unsettled. But if the arbitrator shows that his decision on the merits would have been favorable to the employer anyway, he stills the frustration which otherwise might develop. Accordingly, as might be expected, arbitrators render "advisory" decisions on the merits most often when these decisions are favorable to the employer.⁴⁴

The rendering of a decision on the merits in these circumstances can be a very desirable phenomenon. But it is a service which courts, if they pass upon procedural questions, cannot provide. If they conclude that the union has "lost" the grievance because of procedural deviation, their powers are at an end. They must deny arbitration.

We have shown that courts, if they attempt to pass upon procedural defenses, cannot adequately resolve them. They lack the intimate knowledge of industrial relations necessary to determine whether a "breach" has occurred and, if so, whether it is "excused"; they lack the flexibility to formu-

⁴³ Arbitrators frequently have found that the grievance procedure contemplates "declaratory judgment" grievances. See, e.g., *Wheeling Steel Corp.*, Steel Arb. Dig. 15:556 (Shipman); *Worthington Corp.*, 30 LA 545 (Turkus).

⁴⁴ See, e.g., *North American Aviation Co.*, 16 LA 489 (Komaroff); *North American Aviation Co.*, 20 LA 789 (Komaroff); *St. Joseph Lead Co.*, 28 LA 721 (Klaman); *R. H. Osbrink Co.*, 28 LA 88 (Phelps).

late appropriate remedies for unexcused breaches; and they lack the power to provide adjudication on the merits where the right to relief has been lost. But the courts' lack of competence is not the sole debility which dissuades parties from committing procedural disputes to them. Of equal importance is the incompatibility of the slow-moving machinery of the judicial process with the need for speedy resolution of grievance disputes.

C. The Slowness of the Judicial Process Is Incompatible With the Need for Speedy Resolution of Grievance Disputes

The essential attribute of any grievance machinery is that it provide speedy resolution of grievance disputes. The inclusion in virtually every collective bargaining agreement of "time limits" for processing grievances demonstrates the parties' preoccupation with the need for rapid adjustment. The hotly contested grievance which lingers unresolved is a festering sore in the relations between the parties, which may have a mounting propensity to erupt into precisely the kind of economic conflict the grievance machinery is intended to avoid. Delay is anathema to the very spirit of peaceful cooperation which motivates parties to provide for arbitration of their grievance disputes.

Consider, for example, the dispute involved in *Lone Star Steel Co.*, 30 L. A. 519, and what might have happened if the employer had taken its procedural defense to court. In that case the company purported to discharge 2,500 workers for engaging in a wildcat strike. The union filed a grievance in the third step of the grievance procedure, claiming, *inter alia*, that discharge was too severe a penalty. The grievance was processed to arbitration within a month and a half. The company raised before the arbitrator a "procedural" defense—that separate grievances should have been filed by each employee in the first step. The arbitrator rejected the "procedural" defense, concluding that the mass

discharge was a "top-level" management decision and that therefore the lower steps of the grievance procedure were inapplicable.⁴⁸ He then decided, on the merits, that the company was entitled to discharge the "instigators" of the strike, but that it could impose only lesser discipline upon the remaining participants, and ordered them reinstated. Had the company chosen to take its "procedural" defense to court, instead of submitting it to the arbitrator, absolute chaos might have resulted. The district court might well have ruled, as did the district court in the instant case, that the union could not arbitrate because separate grievances were not filed in the first step by each of the 2,500 individuals. An appeal would have been necessitated. The total time elapsed between discharge and ultimate submission to the arbitrator could well have been years. (The present lawsuit is well into its second year.) Meanwhile 2,500 employees would remain injured, convinced (correctly) that they had been improperly discharged. This hardly would be conducive to the peace which parties hope to achieve when they create an arbitration machinery.

The parties to collective bargaining agreements do not contemplate multiennial delays in the processing of grievances. But judicial resolution of procedural defenses would have precisely that effect.⁴⁹

⁴⁸ See cases cited *supra*, p. 34.

⁴⁹ The company, in its brief (p. 55), argues that the employer intent upon delaying arbitration can in any event succeed by claiming that he has not agreed to arbitrate the subject matter of the grievance. This is true. But the rules governing "substantive arbitrability," enunciated by this Court in *American Manufacturing and Warrior & Gulf*, leave few instances in which an employer will have good faith doubts as to the arbitrability of a particular subject matter. And most employers realize that bad faith resistance to arbitration is poor labor relations policy. By contrast, the complexity of "procedural" questions is such that employers in good faith frequently are unable to predict the correctness of their defense. The temptations to submit such questions to the courts thus would be more frequent, and the consequent delays in the arbitral process more serious.

D. In Practice Parties to Collective Bargaining Agreements Submit Their Procedural Disputes to Their Arbitrators, Not to the Courts.

We have described a number of factors which would be expected to impel parties to submit "procedural" disputes to their arbitrators, rather than the courts. And actual experience demonstrates that parties do, in fact, refer such questions to their arbitrators. There have been only a few dozen cases in which employers have taken procedural defenses to court, as compared to literally thousands of cases in which employers have submitted such questions to their arbitrators.⁴⁷ Indeed, the intentions of the labor-management community are nowhere better expressed than in response to the decisions of the Courts of Appeals for the First and Seventh Circuits, in 1958 and 1959 respectively, holding that procedural questions are for the courts.⁴⁸ Whatever may have been the expectations of parties in these circuits theretofore, they were invited unequivocally to bring their procedural defenses to court, and were assured that they would be resolved there. Yet those invitations have gone virtually unaccepted. In the five years since *Boston Mutual*, only one case has been reported in which an employer submitted a strictly procedural defense to a federal court in the First Circuit.⁴⁹ In two cases, procedural defenses were added as "make weights" to substantive arbitrability

⁴⁷ Some hint of the number of procedural questions presented to arbitrators can be garnered from the several volumes of BNA's "Labor Arbitration Cumulative Digest and Index," under key numbers 93, 94.5-94.6, and 118.305 and Steel Arb. Dig. ¶ 15. These constitute only a small portion of the total, however, for the vast majority of arbitrators' awards are unpublished.

⁴⁸ *Boston Mutual Life Insurance Co. v. Insurance Agents*, 258 F. 2d 516 (1st Cir. 1958); *Brass & Copper Workers v. American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied, 363 U. S. 845 (1960).

⁴⁹ *Local 201 v. General Electric Co.*, 171 F. Supp. 886 (D. Mass. 1959).

defenses.⁵⁰ In the four years since *American Brass*, one procedural defense has been submitted to a federal court in the Seventh Circuit.⁵¹ And all the while hundreds upon hundreds of procedural defenses within the jurisdiction of these circuits have been submitted to arbitrators.⁵²

E. Conclusion

We return to our initial question: how shall the courts respond when procedural disputes are brought before them? Shall they venture into the merits of such disputes? If they do, and recognizing the inability of courts to bring the arbitrator's tools of analysis to the problem, we must expect results like that of the district court in this case: an interpretation linguistically sound but industrially foolish, and a flat rule of law that any deviation by the union from procedures, once found, forecloses the right to arbitrate the grievance—in other words, that the union and the affected employees lose the underlying grievance.

Nor will the problems be one-sided. For management also frequently violates procedural rules, particularly in discharge cases.⁵³ And in some circumstances arbitrators have held that management thereby loses the right to an adjudication of the merits of its conduct, i.e., that the union *wins* the grievance because of the procedural deviation.⁵⁴ If the

⁵⁰ *Local 205 v. General Electric Co.*, 172 F. Supp. 59 (D. Mass. 1959); *General Tire & Rubber Co. v. Local 512*, 191 F. Supp. 911 (D.R.I.) 294 F.2d 957 (1st Cir. 1961).

⁵¹ *Grocery & Food Employees v. Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N.D. Ill. 1963).

⁵² See n. 47, *supra*.

⁵³ See cases cited *infra*, n. 54, and cases digested under key number 118.305 in BNA, Labor Arbitration Cumulative Digest and Index.

⁵⁴ *Hayes Mfg. Corp.*, 17 LA 412, 417-18 (Platt); *Vaughn Mill Works Co.*, 11 LA 296 (Haughton); *Baldwin-Lima-Hamilton Corp.*, 19 LA 177 (Day); *U. S. Hoffman Machinery Corp.*, 22 LA 649 (Hazel); *Trans World Airlines, Inc.*, 24 LA 95 (Gilden); *Kohler Bros. Sand & Gravel Co.*, 25 LA 903 (Anderson); *National Carbide Co.*, 27 LA 128 (Warne); *United States Steel Corp.*, 29 LA 272 (Babb).

courts were to take over from the arbitrators the job of resolving procedural disputes, it would seem to follow that unions would be entitled to judicial enforcement of their grievances upon a showing that management, by violating procedures, had lost the right to defend its conduct before an arbitrator.

Do any of these results make sense? Could the parties possibly intend them? When they agree that all disputes over "interpretation or application" of their agreement are to be arbitrated, reposit in an arbitrator sole authority to settle such disputes, and surrender the use of economic force as a means of settlement, does it effectuate their intentions for courts to deny arbitration? Is it not reasonable to assume that unless they specifically say otherwise they intend that procedural questions be submitted to the arbitrator together with the merits, so that he may determine the dispute taking all relevant factors into account?

Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. §173(d), states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." As this Court has recognized, "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg.*, 363 U. S. at 566.

The parties have agreed that the matters the union seeks to arbitrate are to be resolved, if at all, by an arbitrator. "In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for" (*Id.* at 568). "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement" (*Id.* at 567).

As Professor (now Solicitor General) Cox stated, "Using

the technical language of the law, I suggest that the conventional arbitration clause limiting the arbitrator to disputes concerning 'interpretation and application' of the contract reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that all other questions—procedural, jurisdictional or substantive—are solely within the power of the arbitrator to determine." Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1511 (1959), emphasis supplied.

The agreement in this case contains the "conventional" arbitration clause, committing to arbitration all disputes involving the "interpretation or application" of the agreement (R. 27). The parties have not manifested an intent that procedural defenses be adjudicated by the courts. Accordingly, those questions "are solely within the power of the arbitrator to determine."

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted,

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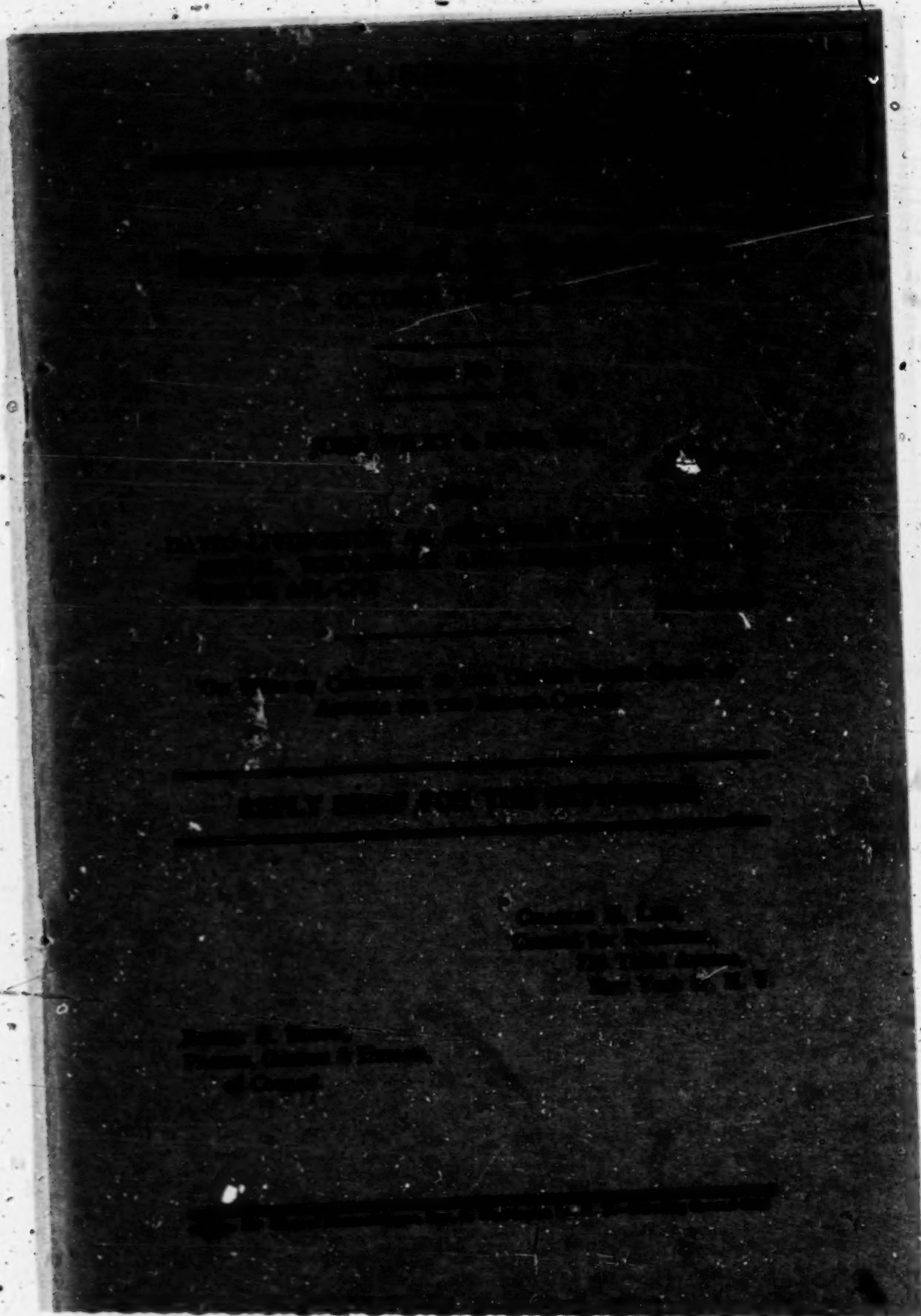
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

DOCKET No. 91

JOHN WILEY & SONS, INC.,

Petitioner.

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL
WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Introduction

We submit this Reply to the briefs of the respondent (hereafter the "Union") and of the AFL-CIO (hereafter "Amicus"). We think we have adequately met most of the Union's points in our own brief, and for that reason will add little in reply to what has already been said.

The brief filed by Amicus requires more critical attention, if only because in looking "out of the corner of one eye at similar, but different situations than the one actually presented here" (Amicus Br., p. 4), Amicus devotes much of its effort and argument and directs many

of its conclusions to situations which are in fact quite dissimilar to the one before the Court.

Amicus finds only two questions worthy of serious discussion. The first is whether Wiley "is bound by the agreement which the union seeks to enforce" (Amicus Br., p. 2). The second is whether, if it is bound by the agreement, "the court or an arbitrator should decide whether the union failed to comply with [the] procedural steps, and whether the effect of such non-compliance is forfeiture of its claim" (Amicus Br., p. 3).

We do not agree with Amicus' statement of issues. We think the two questions it poses are not proper statements of the questions really presented here.

The error in the first question is that it is too broadly stated. The question is not whether Wiley is generally "bound by the agreement" but whether Wiley is required to arbitrate under that agreement.

There is a double error in the second question. The question assumes a mere "deviation" by the Union (Amicus Br., p. 44) from prescribed grievance procedures. In fact, there was never an initiation of the grievance procedure. No grievance was ever framed for arbitration; no demand for arbitration was ever made. It also assumes that unless the Union can arbitrate the claims, the employees will forfeit their rights (Amicus Br., pp. 3, 44), which is not necessarily so,* and more important is not an issue in this case.

From our view of the case, apart from a preliminary question, there are four, and not two, questions which require decision.

* The rights of employees in *Zdanok v. Glidden*, 288 F. 2d 99 (2d Cir. 1961), upon which the Union so heavily relies, were asserted and recognized in a court proceeding commenced by employees, the New York court having earlier dismissed a union effort to require that they be arbitrated. We do not concede that there are any such rights here, but we do not reach that question.

The preliminary question arises in connection with the erroneous direction by the Court of Appeals that Wiley arbitrate whether it is obligated to arbitrate the substantive questions raised by the Union. Neither the Union nor Amicus justifies such a direction. Amicus in effect concedes the error and asks this Court to make the determination instead. The Union denies that the Court of Appeals made the erroneous direction. But the direction was made, and unless this Court decides the issue on its merits, the decision of the Court of Appeals, if only for that reason, must be reversed.

The basic issues, those involving open questions of federal labor law and policy, are as follows:

1. Whether the Interscience obligation to arbitrate with the Union is binding on Wiley, Wiley not having assumed the contract and the contract not purporting to bind successors, where Interscience merged into Wiley and as a proximate result of that merger the business and work force of Interscience was combined with that of Wiley, and the Interscience industrial community was dissolved.

2. Whether in any event the Union, no longer the employees' collective bargaining representative, may in their behalf attempt to enforce by arbitration the collective bargaining agreement—particularly where the claims it asserts relate to working conditions in a different bargaining unit.

3. Whether the claims to permanent economic benefits and job protections in the Wiley enterprise have any root or foundation in the Interscience contract and are arbitrable thereunder; and finally

4. Whether arbitration may be directed where prior to suit no demand for arbitration was ever made and no other condition precedent to arbitration was complied with.

POINT I

The preliminary question concerning the direction that Wiley arbitrate whether it is required to arbitrate the substantive questions raised by the Union.

Both Union and Amicus concede, as argued by us in Point I of our brief, that the court and not the arbitrator must determine whether the obligation to arbitrate the substantive questions raised by the Union survived the consolidation and became binding on Wiley.

The difference in their position is that in the face of the clear direction by the Court of Appeals that this question be referred to arbitration, the Union stoutly maintains that the Court *did* determine that Wiley was required to arbitrate the substantive questions, whereas Amicus, preferring to overlook the error, asks that this Court itself determine that Wiley is responsible to arbitrate the substantive questions.

The Union says that the Court of Appeals "clearly and unequivocally" held that Wiley was obligated to arbitrate the issues tendered by the Union and that that Court "did not refer that question to arbitration" (Res. Br., p. 15).*

It quotes, but apparently misunderstands, this statement by Judge Medina:

"We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in

* Elsewhere in its brief, the Union appears to recede from this position when it says that "Of course, all these contentions [with respect to whether a successor employer must assume the predecessor's obligations to the union] may be advanced before the Arbitrator and a real record made of the underlying facts as to appropriate bargaining unit" (Res. Br., p. 19).

collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract." (R. 94)

but refrains from quoting from the immediately following paragraph:

"... [W]e think and hold, in the exercise of our duty to fashion an appropriate rule of federal labor law, that it is not too much to expect and require that this employer proceed to arbitration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, what employee rights, if any, survived the consolidation." (R. 94-95)

The Union summarily disposes of the concurring opinion by Judge Kaufman by saying that it "cannot be interpreted in any way contrary to [the Union's view of] the Court's opinion". Thus, the Union concludes: "the concurring opinion must be found to hold that the Union may proceed to arbitration against Wiley under the contract" (Res. Br., p. 17). This requires considerable skill at legerdemain in the face of Judge Kaufman's opinion (R. 110-111).

The Union's insistence that the court below decided the issue of Wiley's obligation to arbitrate the substantive issues is obviously not well taken. We join in the suggestion made by Amicus that this Court decide the question, rather than remand for further consideration by the Court of Appeals. We think that on the record before it this Court, on any one of several grounds, may reverse and direct the affirmance of the decision of the District Court

dismissing the proceeding, without sending the case back to the District Court for trial. However, if this is not done, the decision of the court below must still be reversed and, for the reasons hereafter stated, the case sent back for trial.

POINT II

Wiley is not obliged to arbitrate with the Union.

A. The Union's Position

Although Wiley was not a party to, and expressly refused to recognize or assume the Interscience contract, the Union relies upon Section 90 of the New York Stock Corporation Law to justify the imposition of an obligation to arbitrate on Wiley (Resp. Br., pp. 17-18). The Union argues that since collective bargaining agreements have for various purposes been held to be "contracts", a collective bargaining agreement is necessarily within the scope of a state merger statute, the literal language of which reaches "all liabilities and obligations". The Union cites no cases to support this view.

Section 90, entitled "The Rights of Creditors", was clearly not intended to deal with the problems of federal law involved in the determination of whether a collective bargaining agreement of an employer engaged in interstate commerce, and in particular the arbitration provisions of such an agreement, are to bind the surviving or consolidated corporation in a statutory merger or consolidation.

The Court of Appeals as well as Amicus agree that Section 90 can not be held to govern. Although the federal courts may resort to and absorb state law in laying down the federal common law for purposes of Section 301 actions,* the application of state merger statutes to the

* *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 457 (1957).

problem of whether a "successor" employer should be compelled to arbitrate under its predecessor's contract would not be appropriate. This problem requires a uniform rule, determined by the federal courts and not the various state legislatures, applicable to similar economic situations, without regard to variations in state corporate law, or to legal technicalities not affecting the substance of the transaction.** As stated by Amicus, the application of Section 90 would tend to lead to "wholly incongruous results" (Amicus Br., p. 5).

B. The Positions of Wiley and Amicus

Since Section 90 is not to be regarded as controlling, both Wiley and Amicus recognize the need under the doctrine of *Lincoln Mills* to frame a rule of law to determine whether and under what circumstances a surviving corporation in a merger may be obligated under the arbitration provisions of a collective bargaining agreement between the merged corporation and a union which does not by its terms bind successors and which is not assumed by the surviving corporation.

It will be helpful to summarize our position, the position of Amicus, and the errors we find in Amicus' application to the facts of this case of the rule it urges.

Wiley's Position

1. The collective bargaining agreement between the Union and Interscience did not purport to bind successors, either generally or with respect to the obligation to arbitrate. Wiley expressly refused to recognize or assume the agreement.

2. In the absence of a successor clause or an express or implied assumption, the federal courts should not impose the obligation to arbitrate upon Wiley unless, despite the

** Cf. *Local 174, Teamsters v. Lucas Flour*, 369 U. S. 95 (1962).

merger, the Interscience "employing enterprise" and collective bargaining unit (referred to collectively by Amicus as the "industrial community"—a convenient term which we adopt) retain their separate identity and continue in existence, and the Union remains as the unit's bargaining agent.

3. The merger was accompanied by an integration of the Interscience unit into the larger Wiley unit, with the resulting disappearance of the Interscience industrial community.

4. The record either establishes the disappearance of the Interscience industrial community, in which case the dismissal by the District Court should be affirmed, or at least there is a bona fide dispute as to this material fact and the summary judgment directing arbitration should therefore be reversed.

Amicus' Position

Amicus' conclusion that Wiley is required to arbitrate with the Union is based on the following syllogism:

1. Common law principles of contract to the contrary notwithstanding, because of the peculiar nature of a collective bargaining agreement, such an agreement should be held to continue to regulate the industrial community for which it was designed, and to bind a purchaser or other new owner of the business if, despite the change in ownership, the community "remain[s] substantially intact", but not if "the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived." (Amicus Br., p. 13)

2. On the date of the merger there was no change in the industrial community. "On that date Inter-science disappeared as a corporate entity and Wiley succeeded to ownership of the industrial enterprise formerly conducted by Inter-science at 250 Park Avenue. So far as the record discloses, that is all that happened". "For at least some period of time after October 2, 1961 there was no physical change at Inter-science * * *." (Amicus Br., pp. 17, 18)

3. *Therefore*, (a) Wiley on the date of the merger became "bound to" the Inter-science contract, and (b) when "the subsequent physical consolidation" occurred, Wiley, having become so bound, remained obligated to arbitrate with the Union. (Amicus Br., pp. 19, 20)

Errors in Amicus' Assumptions and Conclusions

Error No. 1: That "so far as the record discloses" there was no change in the industrial community on the date of the merger. This is erroneous. The record does indicate a substantial change in the industrial community on the date of the merger.

A more fundamental error occurs in Amicus' failure to recognize that since the Union sought, obtained and now must support summary judgment, Wiley need only show that there is a disputed material question of fact as to whether the industrial community survived to justify reversal.

Error No. 2: That the total termination of the industrial community must occur on "the date" of the merger instead of as a *proximate result* of the merger in order for the successor not to be bound under the contract.

Error No. 3: That if Wiley became "bound to" the contract it necessarily follows that it became bound to arbitrate with the Union under the contract.

C. Discussion of Errors in Amicus' Argument

1. *The survival of the industrial community is at least a disputed question of fact.* Essentially, Amicus urges the adoption of the rule suggested by us in our principal brief under subpoint A, Point II, at pages 25 and following, and restated by Amicus at page 13, that whether Wiley can be bound by the obligation to arbitrate contained in the Inter-science collective bargaining agreement turns on whether the "industrial community has remained substantially intact, or whether the change in ownership has been accompanied by so many other changes in the nature of the enterprise that the industrial community cannot be said to have survived" (Amicus Br., p. 13).

The Union sought a summary disposition in the District Court based solely upon the pleadings and affidavits. The procedure, invoked by the Union, over the objection of Wiley,* was termed by the Union a proceeding "in the nature of a motion for summary judgment" under Rule 56(a) of the Federal Rules of Civil Procedure (See Pet. Br., n. 1 at p. 4). Accordingly, if there is at least a bona fide dispute as to whether the industrial community survived the merger, the order granting the motion must be reversed. Wiley was not required, as Amicus suggests, to establish in its papers that the industrial community did

* In our brief to the District Court, we stated, at page 13:

"If the Union asserts a right to arbitration, it must do so in a plenary suit in which the defendant will have the usual procedural safeguards attendant upon an action in the federal courts. These include an opportunity to develop facts in issue through customary discovery procedures, and an adequate opportunity to prepare for and to proceed to trial on the issues involved."

not survive. The burden was upon the Union to establish clearly and beyond any doubt that it *did* survive.*

Wiley has consistently maintained that the integration of the Interscience and Wiley units and the consequent disappearance and termination of the Interscience industrial community occurred at the time of the merger. This position was taken before the District Court, before the Court of Appeals, and on petition for certiorari. The fact that there was an integration of the two units at the time of the merger was never challenged by the Union in either of the courts below, or in its response to the petition for certiorari.

As Amicus concedes, the Court of Appeals decided the case on the "factual assumption" that the integration of the two units accompanied the merger (Amicus Br., n. 7 at p. 18). The assumption was not induced, as Amicus suggests, by our conceptually confusing argument, but because such an assumption was clearly warranted, both by the record and by the Union's failure to dispute the facts

* Fed. Rules Civ. Proc., 56(c); 6 Moore, Federal Practice ¶ 56.16[3] (2d ed. 1956). Professor Moore states:

"The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing, on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. And the papers supporting movant's position are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden." (pp. 2123-26; footnotes omitted)

as stated by Wiley in its briefs and oral argument to that court.*

The Union, in the courts below, as it does here, rested upon its contention that Section 90—regardless of the survival or disappearance of the industrial community—required Wiley to arbitrate with it. Under its theory, the survival of the industrial community was not a material fact.

The Union has fallen far short of establishing that the Interscience industrial community *survived* the merger. We think the record adequately shows that the industrial community *did not* survive the merger. Viewed most favorably to the Union the record establishes a contested issue as to whether the integration occurred and the industrial community disappeared on the *date* of the merger. But as we point out in the following discussion, the record is clear that the industrial community was dissolved as a *proximate result* of the merger.

2. *The termination of the industrial community need not occur at the instant of merger.* Although Wiley is accused by Amicus of conceptual confusion (Amicus Br.,

* Letters, written contemporaneously with the merger and never answered or challenged by the Union, stated that the Interscience unit was integrated into the larger Wiley unit at the time of the merger and that it thereupon lost its separate identity (R. 78-80). No effort was made by the Union from and after the date of merger to maintain shop stewards, bulletin board, hiring hall, check-off or other union prerogatives (R. 82). The Union's complaint alleges that "after the said consolidation, the job conditions of the former Interscience employees were changed and made more burdensome" (R. 10); that the jobs were "terminated" by Wiley and that it refuses "to continue" them (R. 9). The Union's Turbane affidavit complains of resignations due to changed jobs at Wiley (R. 66). Although it is dated March 3, 1962, the Turbane affidavit shows that nine of the eleven resignations took place before January 24, 1962, the date of the Union's Rozen affidavit which lists 31

p. 17) it is Amicus who falls into that error as a result of its effort to avert the consequences to the Union of an application to the facts of this case of the rule it urges.

This is dramatized by the absurd result to which Amicus' argument leads. If the physical integration occurs on the date of the merger the surviving corporation would not be bound by the contract. However, if the physical integration occurs a day later, the surviving corporation would be fully bound by the contract, liable to all claims which had arisen or might thereafter arise thereunder, and required to arbitrate all such claims with the union. It is difficult to believe that such drastic consequences should turn upon such a rigid and illogical distinction.

Amicus states, on pages 17 and 18, that "the question as to whether Wiley is bound by the agreement is posed by the merger, and by the merger only. The physical integration of the two plants gives rise to . . . questions as to what the agreement means, not questions as to who is bound by the agreement." It conceptually confuses the manner by which the change is made with the effect on the industrial community of such a change.

footnote continued from preceding page

employees (R. 49, 50) as compared with the forty employed by Interscience at the date of the merger (R. 6).

Amicus also errs in suggesting that the Court look only at the physical activities of the employees and the location in which they are performed. This is only one factor in determining whether the industrial community has survived. For example, the Court of Appeals for the Fifth Circuit has stated, in *N.L.R.B. v. Alamo White Truck Service, Inc.*, 273 F. 2d 238, 242 (1959), that it regards "the employee-employer relationship as a most important element in determining whether there is sufficient continuity between two employing enterprises . . ." and pointed to the "difference between the close personal relationship of management and workers characteristic of a small, local business . . . and the disembodied relationship of workers to top management not uncharacteristic of a large corporation . . ." Amicus concedes that on the date of merger there was a change of management (Amicus Br., p. 17).

Admittedly, the merger standing alone does not terminate the industrial community. We have never contended that it does. Amicus says that there is no "litmus paper test" to determine whether the industrial community has survived. "Each case must be decided by an examination of all the facts and circumstances" (Amicus Br., p. 13). We agree.

But clearly, under the rule urged by Amicus it is the *proximate consequences* to the industrial community resulting from a change of ownership (whether by purchase or merger) that must determine a successor's obligation, and not the manner by which the ownership is changed. And clearly, too, the determination of that question requires an examination by the court and not the arbitrator, of the facts and circumstances, not at the precise instant of merger or other change of ownership, but over a reasonable period of time.*

In this case the integration of the two units began immediately and was completed as planned within a short period of time.** A successor should be allowed to proceed in an orderly fashion to terminate the acquired industrial community without subjecting itself to the obligation to arbitrate far-reaching claims with a union with which it has no obligation to bargain.

* Amicus erroneously equates a merger to a purchase of stock (Amicus Br., p. 15). A merger is more akin to a purchase of the assets of the merged company in consideration for the stock of the purchaser. Although in this case the state merger statutes were utilized, the same result could have been achieved by Wiley purchasing the assets of Interscience in consideration for its voting stock. The federal income tax law makes no distinction between these two forms of acquisitions for purposes of nonrecognition of gain. See I.R.C. § 368(a)(1)(A), (C). The law—both in the courts and before the NLRB—is settled that a purchaser (absent an express assumption) is not obligated by the labor contract of the vendor. (Some of the cases are collected by Amicus at n. 1, p. 8, and n. 5, p. 14). While we have not relied on the factual similarity to the asset-purchase cases, the Court might well accept that rule and apply it here.

** See note, *supra*, at page 12.

The National Labor Relations Board in determining whether the industrial community has survived a merger clearly rejects Amicus' "date of the merger" rule. For example, in *Hooker Electrochemical Co.*, 116 N.L.R.B. 1393 (1956), the Board held that where following a merger, the operations of the two units were integrated in an orderly manner, the existence of a contract with the merged unit would not bar a representation petition. The Board noted:

"Integration has already been achieved to a substantial degree and will be complete according to a precise schedule within the next month or two. We must necessarily conclude that the consolidated operations are comparable to an entirely new operation. . . ." (p. 1396)

See also, *American Concrete Pipe, Inc.*, 128 NLRB 720 (1960); *L. B. Spear & Co.*, 106 NLRB 687 (1953); *Chance Vought Corp.*, CCH NLRB Decs. ¶ 10,945 (1962).

3. *Whether Wiley became "bound to" the contract is not necessarily decisive of whether Wiley became bound to arbitrate with the Union.* Amicus also errs in assuming that if the Interscience employees have any claims against Wiley, an issue with which we are not concerned here, it necessarily follows that the Union has the right to assert those claims.

This is a *non sequitur*. It overlooks Amicus' own argument that a collective bargaining agreement is a kind of code establishing the rules under which the industrial community is to be governed (Amicus Br., pp. 6, 7); that "in order to determine who is bound by that code, and under what circumstances, it is necessary therefore to look not to the law of contracts, but to the principles and policies of the federal labor law" (Amicus Br., p. 8). The same must also be true in determining who may enforce the "code".

There are three parties to the code: employer, employees and union, and provided the industrial community continues, one party may move out from, or enter the community, without affecting the relationship between the other parties.

Amicus applies this argument to a new owner of a business who enters the community by purchase or other manner of change in ownership, but it stops short of applying it to a union who leaves the community because it no longer represents the collective bargaining unit of employees.

As Amicus concedes, "the question of whether the Union's representative status survives a change in ownership is [not] exactly the same question as whether an existing collective bargaining agreement survives" (Amicus Br., n. 6 at pp. 14-15).^{*} This distinction between the rights of a union negotiating an agreement to enforce it and the rights of the employees derived thereunder was recognized and noted in *Procter and Gamble*^{**} and *Montgomery Ward*,^{***} to which we refer in our principal brief.

In *Procter and Gamble*, Judge Hays noted this distinction, stating:

"The right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union." (p. 184)

^{*} Amicus' position nevertheless appears to be that a union's loss of representative status would not disqualify it from enforcing a collective bargaining agreement. This is contrary to the law, as we shall hereafter show, as it has developed in the federal courts and before the NLRB.

^{**} *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F. (2) 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), discussed at pp. 40-41 of our principal brief.

^{***} *Retail Clerks v. Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963), discussed pp. 46-48 of our principal brief.

This distinction was again emphasized in *Montgomery Ward* where the Court denied the right of decertified unions to sue under collective bargaining agreements and said:

"... the plaintiff unions contend here that the main purpose of this law suit is to enforce contract terms beneficial to the employees, such as those terms relating to wages, vacations and seniority. We do not reach the question of whether the employees (or some later certified bargaining representative) may enforce such provisions of these contracts."

The consequences of this distinction will be discussed in our next point.

POINT III

The Union is not the proper party to enforce any rights which the Interscience employees may have against Wiley.

Amicus devotes one paragraph to Wiley's argument that the Union is not the proper party to enforce the alleged rights of the former Interscience employees because it has lost its status as collective bargaining agent as a result of the merger. Amicus argues that the Union is not asking the court to give it the status of exclusive bargaining representative but is merely seeking to enforce a contract to which it is a signatory and in whose favor the obligation to arbitrate runs.

This attitude of reading the collective bargaining agreement as a commercial contract can hardly be reconciled with its earlier attack on the strict application of the "privity of contract" doctrine to such an agreement. Since Amicus asserts that a new owner who has neither signed nor assumed a collective bargaining agreement may become bound by it, if and when he enters a continuing industrial community, surely there should be no conceptional difficulty

in holding that a union who was a signatory to the contract is no longer entitled to enforce it when its relationship to the community which gave rise to the contract terminates.

This is what the courts in effect have held.* *Amicus*, although it does not discuss these cases, must necessarily argue that they were wrongly decided since in each the union merely sought to enforce a contract which it had negotiated and to which it was the signatory.

No owner, new or old, should be required to recognize, negotiate, settle or arbitrate employees' grievances with a union which is no longer the collective bargaining representative of those employees. To compel that kind of result merely because the law of contracts would require it** would be to subvert the Federal labor policy which requires an employer to recognize, bargain with, and if the contract so requires, arbitrate with the chosen collective bargaining agent of the group, and no other.

And that must certainly be true, where, as here, the issues which the Union asks to arbitrate relate to working conditions in the new collective bargaining group which may be represented by another union or which may elect to be represented by no union at all.

Amicus argues that "the question is not whether the new owner is a legal successor for other purposes, but

* *Retail Clerks v. Montgomery Ward & Co.*, 316 F. 2d 754 (7th Cir. 1963); *Glendale Manufacturing Co. v. Garment Workers, Local 520*, 283 F. 2d 936 (4th Cir. 1960), cert. den. 366 U. S. 950 (1961); *Modine Manufacturing Co. v. Machinists*, 216 F. 2d 326 (6th Cir. 1954); *Kenin v. Warner Brothers Pictures, Inc.*, 488 F. Supp. 690 (S.D.N.Y. 1960). A corollary is that a union certified during the term of an existing collective bargaining agreement negotiated by another union is not bound by that agreement and a refusal by the employer to bargain on a new contract is an unfair labor practice. *American Seating Company*, 106 N.L.R.B. 250 (1953); *Ludlow Typograph Company*, 113 N.L.R.B. 724 (1955); see also *Hershey Chocolate Corporation*, 121 N.L.R.B. 901, 909-910 (1958).

** Compare *Amicus Br.*, p. 9.

whether it is the successor for collective bargaining purposes" (Amicus Br., p. 15). It must then, consistently, argue that the question is not whether the union was a signatory to the contract, but whether it remains as the employees' collective bargaining agent under that contract.

The Union takes a different position. It contends that only a determination by the NLRB can deprive the Union of its right to enforce a contract which it has signed. This, of course, is not so. Enforcement of collective bargaining agreements has been entrusted to the courts. The courts must necessarily make any determination upon which enforcement of the contract depends. Here the court must determine whether Wiley is a proper party and need not await a determination by the NLRB of whether Wiley is bound by the contract. The court must also determine whether the Union is a proper party since it is called upon by the Union to enforce the contract.

The fact that similar issues might arise in an NLRB proceeding with respect to an unfair labor practice* or a representation** or decertification proceeding does not limit the scope of judicial inquiry when a court is called upon to enforce a collective bargaining agreement. *Smith v. The Evening News Association*, 371 U. S. 195 (1962).

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), relied on by the Union, this Court specifically noted at page 595 that although the contract had expired, the Union continued to represent the bargaining unit. We do not contend that the mere expiration of a collective bargaining agreement deprives the Union of authority to represent the employees. Nor do we contend

* See, e.g., *Administrative Decision of General Counsel*, SR-1880, 50 LRRM 1078, 1962 CCH NLRB ¶ 11,208.

** See e.g., *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956).

that a mere shut-down of a business terminates the Union's status as bargaining representative. What we do contend is that the integration of the unit into another larger unit terminates the Union's bargaining agency. The decisions of the NLRB clearly support this view. (See cases cited, Pet. Br., p. 45.)

Retail Clerks v. Lion Dry Goods, Inc., 369 U. S. 17 (1962), cited by both Union and Amicus, is not in point. That case merely holds that § 301 is not limited to suits to enforce negotiated collective bargaining agreements, but also confers jurisdiction upon the federal courts to enforce a "contract" which a labor organization, not acting in a collective bargaining capacity, made with an employer.

The case does not touch the question here presented, whether a union which made a contract as the authorized representative of an appropriate bargaining unit may enforce that contract after it has lost its representative status.

POINT IV

The issues tendered for arbitration are not arbitrable.

Stated baldly, the Union wants to arbitrate whether the Interscience employees are entitled to certain "permanent economic benefits and job protections" which it is claimed they acquired under the Interscience agreement (Amicus Br., p. 3). The claim is made as a result of the merger of Interscience into Wiley, but the issues sought to be arbitrated do not arise out of the merger as such; they arise from the termination of the Interscience employing enterprise, an event which could have occurred in any number of different ways. That Interscience in this case merged into Wiley merely affords Wiley, who was not a party to the Interscience contract and who did not assume the contract, additional defenses to those which Interscience itself would have had.

The rights claimed are that Wiley must "permanently" grant the kind of seniority specified under the expired Interscience contract and the right to accrue additional seniority in the Wiley establishment; that it must commence and permanently continue to make payments into the District 65 Welfare Plans; and that it must permanently recognize the job security and the grievance and arbitration machinery and the severance and vacation pay provisions of the Interscience contract.

Nothing in the Interscience collective bargaining agreement, which expired on January 31, 1962, provides any basis for the assertion of those claims or for the assertion of a right to arbitrate them. The agreement contains no successor clause; it does not contemplate a merger of Interscience into another company, and makes no provision for any dovetailing of seniority in that event.* By its terms it is specifically limited to Interscience's 250 Fifth Avenue location or any branch office thereof thereafter opened by Interscience.

Moreover, as if to remove any possibility that claims such as these might be made, the agreement states that it embodies "the whole agreement of the parties" and that "there are no promises, terms, conditions or obligations" other than those specifically stated (Sec. 30.0, R. 36).

How then does the Union justify its demand to arbitrate them? It does so solely in reliance on the *Steckworkers* cases** as authority for the proposition that because it says that these claims arise out of the contract, the court must assume that they do, and that it therefore must refer them to arbitration. This, of course, is tantamount to saying that whenever a party says that it is entitled to arbi-

* The court below said that "neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled" (R. 93).

** 363 U. S. 564; 363 U. S. 574; 363 U. S. 593 (1960).

trate a claim (by characterizing its claim, no matter how far removed from the contract, as one made under the contract), it has an absolute right to arbitrate, regardless of whether the claim bears any relation to the contract.

This is the exact proposition only recently categorically rejected by the Seventh Circuit in *Independent Petroleum Workers of America, Inc. v. American Oil Company* (Nov. 21, 1963; unofficially reported at 48 CCH Lab. Cas. ¶18,600). In that case the court, paraphrasing the union's position, "that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration" said that

"This proposition, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.

"Plaintiff's position is devoid of all logic. It is without merit and we so hold. . . ." (at p. 30,185)

The *Steelworkers* cases in our opinion are not authority for any such doctrine and are distinguishable in at least four respects from the proposition advanced by the Union and supported by *Amicus*.

1. The grievances in the *Steelworkers* cases were asserted under contract provisions either specifically stated or necessarily implied. No such provision, express or fairly to be implied, is to be found here.

2. The *Steelworkers* agreement to arbitrate was much broader than that involved in this case.

3. The grievances asserted in the *Steelworkers* cases were "grist for the mill" grievances, the kind normally settled at plant level, which certainly is not the case here.

4. The union in the *Steelworkers* cases continued to represent the collective bargaining unit, which here it does not.

We think it important to elaborate these distinctions lest as a result of unthinking reliance on language used in other context, an erroneous doctrine result that *any* claim that the Union makes must be arbitrated if only it expresses the proper passwords, "This is a contract claim".

1. The Steelworkers claims were made under specific provisions of the contract, either express or necessarily implied.

The grievance in *American Manufacturing* "concededly involved the application of a *specific provision* of the agreement" (Emphasis supplied). This was the union's statement in that case to this Court* and on these facts, this Court said:

"The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement." (363 U. S. 569)

In directing arbitration concerning the construction and application of that specific provision of the contract, the Court rejected the Cutler-Hammer doctrine,** in which the court, determining that the grievance was patently without justification although clearly brought under the contract, held that reference to arbitration would be unnecessary and therefore should not be ordered. The

* Brief for petitioner, *United States Steelworkers of America v. American Manufacturing Company; v. Warrior & Gulf Navigation Company; and v. Enterprise Wheel & Car Corporation*, Nos. 360, 443 and 538, October Term, 1959, hereafter referred to as "Stlwkr. Union Br."

** *International Assn. of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917 (1947), *affd.* 297 N. Y. 519 (1947).

union claimed that approval of this doctrine would defeat the intention of the parties to arbitrate all disputes arising under "some provision of the agreement, express or implied" (Stlwkrs. Union Br., p. 22), and it was in this context that this Court said that the function of the court

"is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." (363 U. S. 568)

Warrior & Gulf involved a grievance arising out of the contracting out of work. The agreement contained a broad arbitration clause. The union argued the case on the ground that "*The grievance in this case plainly did rest on the contract.*" (Emphasis supplied) (Stlwkrs. Union Br., p. 26). This Court agreed. It did so because it accepted the union's assertion of a contract basis for the claim. It said:

"Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." (363 U. S. 584)

It also did so because it accepted the union argument that some limitation on contracting out was reasonably to be implied from the agreement as a whole, the agreement containing no provision to the contrary, because otherwise the company would be free completely to destroy the collective bargaining agreement by contracting out all the work" (Concurring Opinion, 363 U. S. 572).

Thus, on a showing of a consistent practice to arbitrate claims of that sort and a finding that otherwise the entire contract could be frustrated during its term, the Court read into the contract a limitation on the right to contract out and required that the issue arising under that limitation be arbitrated.

Enterprise, of course, involved a specific provision of the contract, the only question before the court being whether the discharged grievants were entitled to back pay notwithstanding the expiration of the agreement. In affirming the arbitrator's award, this Court adopted the union contention that the award was based "not on the law of contract damages, but on the *language of the agreement*, which *expressly prescribed* that employees unjustly discharged during its term were to be reinstated with back pay" (Emphasis supplied) (*Stlwks. Union Br.*, p. 26).

2. The Interscience arbitration clause is much narrower than those involved in the *Steelworkers* cases.

The arbitration clauses in the *Steelworkers* cases were broad and unlimited.

The Interscience arbitration clause on the other hand, is not a broad and unlimited clause. Although the preamble of Section 16.0 (R. 27) is broad, it is limited by clauses, found elsewhere in the contract, that differences arising out of specifically identified provisions of the contract are not to be arbitrated.*

Thus, the Interscience agreement to arbitrate is a limited agreement. Moreover, it contains a specific exclusion clause stating, in substance, "that, in addition to other provisions elsewhere contained in [the] agreement which expressly deny arbitration to specific events, situations or contract provisions," arbitration should not be required of "matters not covered by this agreement" (Sec. 16.5, R. 29). Merger and permanent rights following merger are not covered by the agreement.

* Sec. 16.8 (R. 29), provides that whenever the right to exercise its sole discretion or judgment is reserved to the employer, its exercise or non-exercise shall not be arbitrable. Provisions covered by this reservation are Sections 6.10 (R. 17); 7.2 (R. 18); 18.0 (R. 31) and 18.2 (R. 32).

3. There is a basic difference between the grievances in the *Steelworkers* cases and the Union's claim in this case.

The grievances in the *Steelworkers* cases were those of a grist for the mill kind, settleable "at plant level" (363 U. S. 596), and they were asserted in behalf of specifically identified grievants. That is certainly not the case here. The claims here are, to say the least, unique; they purport to be made on behalf of employees who remain faceless and unnamed, and their nature is such that they can hardly be settled at "plant level".

4. The Union here is not the collective bargaining agent for the employees for whom it says it speaks. In the *Steelworkers* cases, it was.

The rationale supporting the decisions in the *Steelworkers* cases is that a subsisting collective bargaining agreement is a system of industrial self-government; that the grievance and arbitration machinery is at the very heart of it, and that the processing of even a frivolous claim is likely to have a therapeutic value, helpful to the continuing "working relationship" between the parties (363 U. S. 580, 581). Here, of course, there is no continuing working relationship or continuing employing enterprise. Interscience has disappeared and the Interscience collective bargaining unit has lost its identity. There is no system of industrial self-government to preserve.

The *Steelworkers* cases, then, were conventional grievance cases arising under and during the term of the contract.

Here, on the other hand, arbitration is sought to determine whether Wiley will be liable, after the expiration of the Interscience contract, for the commitments made by Interscience for the life of the contract.

No effort is made to state a contract basis for the claims to post-contract rights. The complaint alleges that Wiley refused to recognize the validity of the contract "currently and beyond January 30,* 1962" and that it has refused to recognize the property rights of the Interscience employees "thereunder [that is, under the contract] and otherwise beyond January 30, 1962" (R. 5). It alleges that the employees will be seriously affected unless the seniority rights are recognized and protected in accordance with the agreement "or otherwise" (R. 6). On this basis the Union asks to arbitrate whether Wiley must accord seniority and other rights "now" (that is, when the complaint was filed, a week before the contract expiration date, a question that is moot) and "after January 30, 1962", the contract expiration date. (Emphasis supplied.)

It is clear that the Union does *not* rely on the contract. Instead, it relies on rights "otherwise" claimed.

This Court, in the *Steelworkers* cases, could not have intended that claims to permanent rights to employment, compensation and working conditions, so lacking in root or foundation in the contract, can be forced to arbitration under the contract, no matter how broad the contract arbitration clause. Indeed, the excerpt from Professor Cox's article** which this Court quoted with approval in *American Manufacturing* (363 U. S. 568), is immediately followed in the text with the observation which, if it meets with the Court's approval, as we think it must, disposes of the issue.

"Once this interpretation is put upon the arbitration clause (that the typical arbitration clause constitutes 'a promise to arbitrate every claim, meritori-

* Respondent's error. The contract expiration date was January 31, 1962.

** Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958).

ous or frivolous, which the complainant bases upon the contract') the court's role is limited to determining whether the moving party is *really* basing its claim on the contract or is seeking to have the arbitrator decide according to equity and sound industrial relations. In the latter event *arbitration should be denied.*" (Emphasis supplied, p. 261)

The Union's claims are not "really" based on the contract; they are based on its own notions of equity and industrial relations, built on its own variety of political and economic philosophy.

We think that the principles stated in *System Federation No. 59 v. Louisiana & A. Ry.*, 119 F. 2d 509 (5th Cir. 1941) remain the law. There it was said:

"The only question with which we are here concerned is whether the seniority rights claimed, arise out, and exist, because of, the 1929 contract, and persist during and only during its term, or whether they indefinitely continue to exist after it has been abrogated, . . ."

"On this point the authorities are uniform. They settle it that collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in accordance with its provisions." (119 F. 2d 515)

The eminent counsel who argued for the unions in the *Steelworkers* cases agreed with this view, at least at the time they briefed those cases to this Court. In their brief they distinguished *System Federation No. 59* from *Enterprise* on the ground that the violation claimed in the cited case arose *after* the contract had expired, whereas in the *Enterprise* case the grievance had arisen and the claim had

been filed long *before* the agreement expired. In supporting this distinction they said:

"The court [in *System Federation No. 59*] there held, quite properly, that the seniority rights created by the agreement existed only *so long as the agreement existed*, and the employer could not be said to have violated those rights after the agreement expired." (Emphasis supplied) (Stlwks. Union Br., p. 77)

We need not argue here the merits of the substantive claim to permanent rights. If they have validity they should be established in a court of law in the same manner that employees sought to establish their rights in the *Glidden** and in the *Oddie*** cases. We need only say that claims such as these can not be established through arbitration, for arbitration is consensual, and it would strain the imagination to suggest that Interscience intended or can fairly be presumed to have intended to submit this kind of claim to arbitration.

POINT V

The effect of the Union's failure to comply with the conditions precedent to arbitration.

We argued before the Court of Appeals that since the obligation to arbitrate is, as declared by this Court, a matter of contract, the Court must determine whether that obligation has been breached. This necessarily requires the court to determine whether the obligation to arbitrate was qualified by conditions precedent, and if so, whether they have been met (See Pet. Br., Point III).

* *Zdonok v. Glidden*, 288 F. 2d 99 (2d Cir. 1961), affd. on another point 370 U. S. 530 (1962).

** *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (1962).

The Court of Appeals (on whose opinion on this point the Union here relies) did not meet our argument, but merely held that the effect of a failure to comply with the grievance and arbitration procedure was for the arbitrator's determination. The result was based in part on a misreading* of certain language in *United Steelworkers v. American Mfg. Co.* and in part on certain policy considerations. We submit that if this Court does not intend to repudiate its holding that the obligation to arbitrate is contractual, the Court of Appeals' opinion cannot logically stand.

Amicus, in recognition of the inconsistency between the pronouncements of this Court and the reasoning of the Court of Appeals, would reach the same result by a highly artificial *rule of construction*, as distinguished from a rule of law as laid down by the Court of Appeals.

A. Amicus' Proposed Rule of Construction

Amicus' argument is not new. It is no different in principle than the argument, rejected by this Court in the *Steelworkers* cases, that whether a claim is "substantively" arbitrable should be determined by the arbitrator and not by the court. The logic (all questions concerning the "interpretation or application of the agreement are to be arbitrated) as well as the empirical evidence adduced (the large number of arbitration proceedings in which procedural defenses were passed on by an arbitrator) is essentially the same.

Here Amicus argues that the parties "have agreed to commit all questions concerning 'interpretation or application' of the agreement to arbitration," and therefore whether the contractual promise to arbitrate is conditioned upon procedural compliance is for the arbitrator (Amicus

* Discussed in our principal brief at footnote 38, page 51.

Br., p. 26). The answer to such reasoning has already been given:

"Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects the position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary." *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 571 (1960) (Concurring Opinion)

Amicus states that "actual experience demonstrates that parties do, in fact, refer such questions ["procedural arbitrability"] to their arbitrators", pointing to the large number of arbitration decisions in which the issue was raised. It then argues that this reflects the "intentions of the labor-management community" which Amicus invites the Court to read into every collective bargaining agreement (Amicus Br., p. 43). This is also but an echo of the reasons given to further the argument that "substantive arbitrability" should be determined by the arbitrator. See Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 649 (1959). The fact that the parties continue to submit questions of "procedural arbitrability" to the arbitrators even in those circuits where the Court of Appeals has ruled the question to be one for the court is no more significant than the fact that parties throughout the United States continue to raise before the arbitrator questions of "substantive arbitrability" even though this Court has unequivocally held the question to be one for the court. See Smith, "Arbitrators & Arbitrability", *Proceedings of the Sixteenth Annual Meeting, National Academy of Arbitrators* 75 (1963).

The parties are free, if they both consent, to allow either issue to go to the arbitrator, and as a practical matter, will frequently do so. Whether a consistent practice on

the part of particular parties to do this would constitute the necessary "clear demonstration"* that the parties intend the arbitrator to determine arbitrability need not be decided at this time. However, it is clear that the necessary "clear demonstration" as to both "substantive" and "procedural" arbitrability, is not present merely from the fact that there were and continue to be many arbitration decisions in which the arbitrators pass on questions of arbitrability.

Although it would appear that this Court has clearly foreclosed the argument advanced, *Amicus*, far from finding any inconsistency between *Steelworkers* and the rule it urges, boldly argues that the famous trilogy actually supports its position. We believe the explanation for this anomaly is as follows:

In *Steelworkers*, this Court laid down two rules. The first, to determine who is to decide arbitrability:

"Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance, but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a *clear demonstration* of that purpose."** (Emphasis supplied.)

The second, to guide the court or the arbitrator making the decision on arbitrability:

"An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes."***

* *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, n. 7 at p. 583 (1960).

** *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, n. 7 at p. 583 (1960).

*** *Id.*, at p. 583.

The basic error in Amicus' argument is that it applies the wrong *Steelworkers* rule, applying the second rule to a question which the first rule was intended to answer.

Wiley asserts that the dispute is not arbitrable because the promise to arbitrate was qualified by conditions that have neither been performed nor excused. The issue raised is simply and solely arbitrability—must Wiley submit the Union's claims to an arbitrator.* The question before this Court is whether the court or the arbitrator should decide this single issue—the arbitrability of the Union's claims.

✓ The answer has already been given by this Court in *Steelworkers* in what we may refer to as the "clear demonstration" or first *Steelworkers* rule. There is no basis for a different answer to the essentially identical question presented in this case. Since the Union has failed to make a clear demonstration of a contrary intent, the issue of arbitrability is for the Court.

✓ And if the court in deciding arbitrability is to apply a presumption analogous to the second *Steelworkers* rule, the presumption would have to fall before the express language used by the parties here that "The failure by either party to file the grievance within [the] time limitation shall be . . . deemed to be an abandonment of the grievance" (Sec. 16.6; R. 29).**

* The issue of arbitrability does not encompass, as Amicus suggests, the question whether the Union should be penalized for procedural breaches if such breaches do not bar arbitrability. This, of course, would be for the arbitrator. Nor does the issue involve whether the Union or the employees might enforce their alleged claims in another type of proceeding.

** Although it may very well be that the second *Steelworkers* rule has no application to the determination of "procedural" as distinguished from "substantive" arbitrability.

B. The Union Abandoned the Arbitration Remedy

The facts of this case do not show a mere procedural defect or deviation as both the Union and Amicus imply. The facts reflect a *total abandonment* by the Union of arbitration and an *election* to rely upon bargaining to gain the benefits sought on behalf of its members. In doing so it obtained substantial benefits for the Interseience employees.*

Even if it is assumed the parties intended that the arbitrator himself would determine whether a procedural defect or deviation destroyed his jurisdiction, there is no justification for presuming that the parties intended to confer on the arbitrator the right to determine arbitrability where the Union never makes a demand for arbitration.

Indeed, we suggest that the failure to *demand* arbitration deprives the court of the jurisdiction it has assumed under Section 301 of the Labor Management Relations Act. Without a prior demand to arbitrate, there can be no refusal, and therefore no showing, required by the Act, of a "violation" of a contract to arbitrate.

C. The District Court correctly Held That the Union Abandoned Its Right to Arbitrate

The Union also argues at length (Resp. Br., pp. 2, 40-50) that even if the court and not the arbitrator is to determine whether, in view of its failure to invoke the grievance and arbitration provisions of the contract, it is entitled to arbitration, the District Court erred in its decision on the merits. Since by this time we are not strangers to the Union's arguments, we believe they have generally been anticipated and dealt with adequately in our principal brief. A few additional comments are in order.

To say that "strict compliance" with procedures set forth in the contract should not be required is to suggest

* See our principal brief at n. 44, p. 55.

that there was some attempt to invoke the grievance and arbitration provisions of the contract. There was never even the slightest suggestion that the contract procedures were being invoked. If doctrines of waiver or estoppel are to be invoked, they clearly should be applied in favor of Wiley, who was misled by the Union's conduct into granting substantial benefits to the former Interscience employees.

The cases cited by the Union on pages 41 through 48 do not support its argument.*

* For example, in *River Brand Rice Mills v. Latrobe Brewing Company*, 305 N. Y. 36, 110 N. E. 2d 545 (1953) (Resp. Br., p. 41), described by the Union as a "leading case" a New York court had previously held that arbitration of the claim involved was barred because the claimant had failed to demand arbitration within the five day period required by the contract. The Court of Appeals held that the seller could not obtain relief through a lawsuit, even though his remedy by arbitration was foreclosed. The portion of the opinion quoted by the Union was pure *dicta*, and there is nothing in the opinion to cast doubt on the correctness of the previous holding barring arbitration.

Matter of Tuttleman, 274 App. Div. 395, 83 N.Y.S. 2d 651 (First Dept. 1948) (Resp. Br., p. 42) involved the standard commercial arbitration clause. The right to demand arbitration was not subject to any express condition precedent or time limitation. Another clause of the contract, unrelated to the arbitration provision, required that any claim that merchandise was defective be made within ten days after delivery. The court correctly held that the ten day provision was not a statute of limitation for instituting arbitration proceedings, but was a matter going to the substance of the party's claim, compliance with which was a matter for the arbitrator to determine. *Matter of Raphael*, 274 App. Div. 625, 626-628 (1st Dept. 1949) (Resp. Br., p. 42); *Barr & Co. v. Municipal Housing Authority*, 86 N.Y.S. 2d 765 (Sup. Ct. Westchester Co. 1949), *affd.* without opinion 276 App. Div. 981 (2nd Dept. 1950); *W. S. Ponton Inc.*, 101 N.Y.S. 2d 609 (Sp. Term N. Y. Co. 1950), *affd.* 102 N.Y.S. 2d 445 (1st Dept. 1951); and *Application of Roselle Fabrics, Inc.*, 108 N.Y.S. 2d 921, (Sp. Term N. Y. Co. 1951) (all cited in Resp. Br., p. 42), are further examples of the rule in *Tuttleman*.

(footnote continued on following page)

(footnote continued from preceding page)

The following cases cited by the Union deal with whether the court or the arbitrator is to determine arbitrability and are not relevant to the issue for which they are cited: *Insurance Agents v. Prudential Insurance Co.*, 122 F. Supp. 869 (1954) (Resp. Br., p. 45); *United Cement Workers v. Allentown-Portland Cement Co.*, 163 F. Supp. 816 (1958) (Resp. Br., p. 45); *Local Union 516 v. Bell Aircraft Corp.*, 283 App. Div. 180 (4th Dept. 1954) (Resp. Br., p. 42); *Roto Supply Sales Company v. District 65*, 32 CCH Lab. Cas. 170,796 (Sp. Term N. Y. Co. 1957) (Resp. Br., p. 44); *In re Taurone Label Co. (Livingston)*, 39 CCH Lab. Cas. 166,390 (Sp. Term N. Y. Co. 1960) (Resp. Br., p. 45).

Analyzing the many cases cited by the Union in its brief, we find citations to only five lower state court decisions and three arbitration decisions as instances where the court has excused "strict compliance with the grievance machinery procedures" and allowed arbitration. Each of these cases is clearly distinguishable on its

facts from the present case, which involves not a failure of "strict compliance" but a total disregard of the express and detailed terms of the contract. A discussion of only one of these cases should be sufficient to illustrate their inapplicability.

In *Livingston v. Tele-Ant Electronic Co.*, 4 Misc. 2d 600, 138 N.Y.S. 2d 111 (Sp. Term, N. Y. Co. 1955) (Resp. Br., p. 45), the employer sought arbitration of its claim that the union was liable to it for pecuniary damages sustained by the employer when an employee under 18 years of age, supplied by the union, was injured. The case involved District 65 and the union there sought to stay arbitration on the ground that the demand for arbitration was not timely! Under the facts of that case the court, in dicta, stated that the time requirement was ambiguous and that the employer had sought arbitration as expeditiously as possible under the circumstances. The actual holding of the case was that the issue involved was not arbitrable.

The other cases, all similarly distinguishable, are *Matter of Teschner*, New York Law Journal, August 4, 1954, Gold J. (Sp. Term N. Y. Co.), aff'd 285 App. Div. 435, 137 NYS 2d 901 (1st Dept. 1955), aff'd without opinion, 309 N. Y. 972 (1956) (Resp. Br., p. 42); *Matter of Greenstone*, 8 Misc. 2d 1045, 166 NYS 2d 858 (Sp. Term N. Y. Co. 1957) (Resp. Br., p. 43); *In re Pocketbook Workers Union*, 14 Misc. 2d 268, 149 NYS 2d 56 (Sp. Term N. Y. Co. 1956) (Resp. Br., p. 46); *Arsenault v. General Electric Co.*, 21 Conn. Supp. 98, 145 A. 2d 137 (Super. Ct. 1958), aff'd 147 Conn. 130, 157 A. 2d 918 (1960), cert. den. 364 U. S. 815 (1960) (Resp. Br., p. 44).

The District Court's finding that the Union, without justifiable excuse, completely ignored the grievance procedures set forth in the contract is amply supported by the record. Its decision should not be disturbed. Cf. *Commissioner v. Duberstein*, 363 U. S. 278 (1960).

Respectfully submitted,

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